IN THE

Supreme Court of the United States

OCTOBER TERM, 1948.

No. 31.

31

JESS LARSON, as War Assets Administrator and Surplus Property Administrator, *Petitioner*

v.

DOMESTIC AND FOREIGN COMMERCE CORPORATION

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

BRIEF FOR THE RESPONDENT.

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BRIEF FOR THE RESPONDENT.

OPINIONS BELOW.

The District Court of the United States for the District of Columbia (by Justice Jennings Bailey), dismissed respondent's complaint off the bench in an oral decision without opinion. The United States Court of Appeals for the District of Columbia Circuit (by Justices Clark, Wilken K. Miller, and Prettyman) reversed the dismissal upon opening, answering, and reply briefs, after hearing four hours of argument by counsel. The unanimous opin-

ion of the Court is reported at 165 Fed. 2nd 235 (Adv.); appears at page 55 through 59 of the record; and, for the convenience of the Court, is set forth in full in the Special Appendix, pp. 71-75, *infra*.

This was the same bench which decided the case of *Dollar* v. *Land*, 81 U. S. App. D. C. 28, 154 F. (2d) 307, upon appeal to that Court, which judgment was recently affirmed by this Court (330 U. S. 731).

JURISDICTIONAL STATEMENT

The petitioner has invoked Sec. 240(a) of the Judicial Code.

QUESTIONS PRESENTED.

(1) Whether a government official, duly authorized to dispose of government surplus, who has *disposed*[1] of surplus government coal of unique value by a binding contract of present sale, thereby conveying title to a citizen, may recapture title thereto by his own act of will, convert by resale at the same price, and thus confiscate the citizen's property wholly without authority in law; and

(2) When charged therewith by a sworn complaint, employ a *speaking demurrer denominated a motion to dismiss* to claim sovereign immunity by asserting, in surprise affidavits only and not by answer, an affirmative defense—title in the United States—in denial of the express allegation of the citizen's title in the sworn complaint, supported by exhibits, which plainly show a contract of present sale;

(3) Whether he may assert breach of the contract, also an affirmative defense, in the same way, without filing an *answer* or permitting an issue to be reached;

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[1] Petitioner concedes at p. 25 of his brief that the coal here in question was disposed of by the U. S. which could only mean that the entire property interest had been conveyed to respondent although petitioner later seems to attempt to withdraw his admission by an erroneous claim of breach.

(4) Whether an officer of the United States has authority to exceed his authority by "misconstruing" a citizen's title to his property, merely because title had once been in the sovereign United States.

(5) Whether a threatened future tort of conversion by government officer of a citizen's unique property cannot be restrained and prevented.

(6) Whether, in view of the *Lee—Land* line of authorities there is any difference between a wrongful withholding of possession and a wrongful seizure of possession.

(7) Whether a valid *disposal* or *sale* statute of the United States can be converted into a condemnation, confiscation, recapture or acquisition statute by the mere whim of an officer of the United States.

(8) Whether title to many billions of dollars worth of personal and real property formerly owned by the United States may be unsettled by wrongful retention or seizure of possession by an officer.

STATUTES INVOLVED.

The applicable portions of the Uniform Sales Act are the definitions of contract of sale and contract to sell:

> "(1) A *contract to sell goods* is a contract whereby the seller agrees to transfer the property in goods to buyer for a consideration called the 'price'.
>
> (2) A *sale* of goods is an agreement whereby the seller *transfers* the property in goods to the buyer for a consideration called the 'price'." (D. C. Code 1940) (Tit. 28, Sec. 1101) (italics supplied)."

The provision of Section 15 of the Surplus Property Act of 1944 Act of October 3, 1944, c. 479, 58 Stat. 765, 772-773, 50 U. S. C. App. 1624, is also included:

> "SEC. 15. (a) Notwithstanding the provisions of any other law but subject to the provisions of this Act, whenever any Government agency is authorized to *dispose* of *property under this Act* then the agency

may dispose of such property by *sale*, exchange, lease, or transfer, for cash, *credit*, or other property, with or without warranty, and upon such other terms and conditions, as the agency deems proper. . . ."

"(b) Any owning agency or disposal agency may execute such documents for the *transfer of title* or other interest in property or take such other action as it deems necessary or proper to *transfer or dispose of property* or otherwise to carry out the provisions of this Act, and, in the case of surplus property, shall do so to the extent required by the regulations of the Board." (Italics supplied.)

PRELIMINARY STATEMENT.

This Court granted certiorari to the Petitioner Larson upon a petition which contained a representation of fact which was erroneous. ". . . respondent having failed to fulfill its contractual obligation to make *a single cash payment*". (p. 16 Pet. for Cert. # 649 October 1, 1947)

This mis-statement was called to petitioner's attention in no uncertain terms (Brief in Opp. to Cert). In acknowledgment of this error, he has now omitted it from his statement of fact. But he has erroneously included it in his argument upon which almost his entire third section of his brief is predicated:

"The complaint (including exhibits) discloses that respondent *breached* the *agreement* by refusing to deposit *$17,500* in *cash* with the designated Dallas bank and by insisting on *substituting payment* by means of a letter-of-credit, which seriously disadvantaged the War Assets Administrator and *did not comply* with the *contractual requirements*." (Pet. Brief, p. 23) (Italics supplied.)

". . . and the Government refused delivery on the ground that respondent, having fulfilled its contractual obligation to make a *single cash deposit* in a Dallas bank, thereby breached the agreement". (Pet. Brief, p. 26.) (Italics supplied.)

"We think it plain from this recital that the parties' agreement was that respondent would deposit the *full*

$17,500 *in cash* in the Dallas bank *before any* of the coal was shipped." (Pet. Brief, page 81). (Italics supplied)

Petitioner's new Statement of Fact, although omitting the mis-statement above referred to, includes confusing and disjunctive assertion.[2] For which reason it is deemed necessary to restate the facts as follows in the Restatement.

COUNTERSTATEMENT OF FACTS.

In early 1946, the Domestic and Foreign Commerce Corporation received notice that there was a large quantity of bituminous coal, located at various Army camps in Texas and adjoining states which had been declared surplus and for which the government had received no acceptable bids.

[2] The error of the petitioner's "Statement of Fact" is clearly revealed by (1) the recital of certain printed form provisions of his contract plainly rendered inoperative by other terms, notably (at p. 6; Pet. Br.) "*unless credit* is provided for in the sales memorandum, payment must be made" etc. (italics supplied) despite the fact that credit plainly had been provided by Petitioner's acceptance of the contract on "your (respondent's) terms of placing $17,500 with the First National Bank, Dallas, Texas, for payment *upon presentation of our invoices to said Bank.*" This was quoted directly above the other quotation at the same page (Pet. Br. p. 6). Inasmuch as the invoices could not possibly be presented until the coal had been loaded and shipped there could be no clearer way of providing credit. (2) Petitioner's recital of factual charges from affidavits filed in support of his Motion to dismiss the complaint but with a footnoted (No. 10, p. 13, Pet. Br) denial of reliance thereon. If no reliance was placed upon the affidavits why were they needlessly recited? (3) Petitioner devotes pp. 7 through 10 to a lengthy recital of the correspondence which passed between Petitioner and respondent after Petitioner decided to deny the effect of respondent's executed and binding contract in order to give respondent's coal to a later and persuasive purchaser who sought respondent's coal. This long recital merely demonstrates that respondent although under no contractual obligation to do so made a vain attempt to meet the constantly changing whim and caprice of the Petitioner, not realizing that it was in vain because Petitioner had decided to "unsell" the coal which the United States had validly sold and disposed of on March 13, 1947, over a year and a half ago.

The Domestic and Foreign Commerce Corporation purchased somewhat in excess of 100,000 tons of this coal (it pioneered in the field to the great benefit of the government) from the War Assets Administration at a price of $1.75 per ton, which was far above other offers of only a few cents per ton. This coal had been in open storage for two years. Coal deteriorates rapidly under these conditions. It was located at points from which coal did not normally move to ports, and where, therefore, only high class rates existed. (Complaint, Par. 4, R. p. 2.)

The Domestic and Foreign Commerce Corporation arranged for the establishment of special low freight rates to ports, made an extensive market survey, and eventually succeeded in reselling the coal for export at a substantial profit. The Domestic and Foreign Commerce Corporation fully and completely complied with all the terms of its contract with the War Assets Administration and divided the coal fairly among foreign governments to whom the U. S. Government desired that it should go. The movement was of great assistance to the economy of Europe (Complaint, Par. 4, R. p. 2). Because the coal was government "surplus," special export licenses were obtained over and above the regular allocations to the various countries. This of course gave this coal unique value to exporters. (Complaint, Par. 4, R. p. 2 and Par. 6 R.)

Early in March of 1947, the War Assets Administration offered an additional 10,000 tons to the Domestic and Foreign Commerce Corporation and this was purchased (Complaint, Par. 4, R. pp. 2, 3) through an exchange of letters and telegrams which are Exhibits A through E to the Complaint (App. pp. 10 through 30 incl.), *as a continuing part of the previous contract.*

War Assets then asked that a record of the contract be made on its form denominated "sales memorandum" which is Exhibit E to the complaint, which was done. The contract was made on the same terms and conditions as the previous contract and provided for the payment of cash, on sight draft accompanied by shipping documents, for the

coal f. o. b. cars at its location, the exact amount to be determined by railroad weights of the coal.

Domestic and Foreign promptly resold the coal (Complaint, Par. 5, R. pp. 2, 3). Exhibits A through E (R. p. 10 to 16) relying on its previous favorable experience with War Assets Administration and upon legal advice that the coal was specific, ascertained, and deliverable, and that, since the "sales memorandum" repeatedly referred to itself as a "contract of sale" and referred to the coal as "sold to", the Domestic and Foreign, title had passed to it. In the light of the successful experience known to both parties of the year before, it felt that it might with perfect safety resell to its customers. The coal was resold at a price of $2.75 per ton plus a share of profit above $1 per ton to the coal exporting firm known as the Penn Pocahontas Coal Company(a company closely allied to one that was used as exporter the previous year, namely the J. P. Routh Coal Company, whose officers and owners are substantially the same as Penn Pocahontas Coal Company (Complaint, par. 13, R. p. 7). Penn Pocahontas resold to the Portuguese government (Affidavit of Kingsley, R. pp. 33 and 34).

The Penn Pocahontas Coal Company promptly established and irrevocable letter of credit to pay the War Assets for this coal against shipping documents (Complaint, Par. 6, App. p. 4, Exhibits M and N, App. pp. 25, 26). The War Assets Administration which has solicited the bid, then, in a most unusual way, began to seek an out on its contract. The Dallas office of War Assets Administration began to insist successively that various details of the letter of credit were unsatisfactory to them (Complaint, Par. 6 through 9, R. pp. 4 through 6). Although the Domestic and Foreign Commerce Corporation had repeated changes made through the Penn Pocahontas Coal Company (Complaint, Par. 8, App. p. 5), to satisfy the wishes of War Assets in this respect, the War Assets Administration at Dallas, on April 16, 1947, late in the evening, wired the Domestic and Foreign that its contract was cancelled, and declined to respond to two telegrams and to answer one

telephone call attempting to determine the reason for the cancellation (Complaint Par. 10 and 11, R. p. 6).

Protest was made promptly (i. e., on April 18th) to the Deputy Administrator in Washington, General Mollison, and to the then General Counsel, Col. Jess Larson (Counter-affidavit of Kingsley, R. pp. 51 through 53). They promised Major Kingsley, President of Domestic and Foreign Commerce Corporation, and Mr. Ansberry, his counsel, the entire file would come to Washington for review and that the officers of Domestic would have an opportunity to discuss the unwarranted position of the Dalla's office here in view of the difficulty of communication with Dallas caused by the telephone strike. Nevertheless the respondent heard nothing from the officials of War Assets in Washington, despite repeated efforts to reach them, up to and including April 24th (Counter-affidavit of Kingsley, R. pp. 51 through 53). On April 24th, Mr. Ansberry was finally able to reach the Dallas office on the telephone, and was informed that the coal had been sold as of April 21st to the Midland Coal Company of Dallas for the same price, that the matter was closed and that although they had received Col. Larson's teletype requesting a review of the file, that Col. Larson "don't happen to be running our office" (*Id.* at R. p. 53). At this point Domestic and Foreign arranged for the filing of this suit and the obtaining of this temporary restraining order (R. pp. 35 and 36) herein issue, with all possible dispatch. It was only at that point, namely on April 29, 1947, that the representatives of Domestic and Foreign, despite continued previous attempts were able to discuss the matter again with counsel for War Assets.

The foregoing discussion of the conduct of the War Assets Administration is offered to the Court as shown the strong equities existing in respondent's favor.

Upon the filing of the complaint a temporary restraining order was issued. On the hearing of a motion for injunction pending trial the petitioner filed (five minutes prior

thereto) a motion for dismissal of the complaint supported by two lengthy affidavits. (R., pp. 40 through 50.)

The petitioner in his motion contended that the suit was in effect against the United States because title could not have passed to the respondent as alleged in the complaint; and that therefore the suit was in effect against the United States and failed to state a cause of action, due to sovereign immunity. In this, petitioner was sustained in the District Court (which filed no opinion). The Court of Appeals unanimously reversed on the grounds first, that the allegation of title in the complaint had to be taken as true on motion to dismiss and, second, that if title was in the citizen, sovereign immunity did not protect a government officer interfering illegally with the citizen's property. Therefore, the Court of Appeals correctly said, we respectfully submit, that the District Court should have taken evidence on the point of title before it could dismiss on the ground of sovereign immunity:

> "In the complaint appellant asserted that the title to the coal had passed to it (appellant) and appellee, through his agents, was presently engaged in negotiations for disposition of the coal to a party other than the appellant. The complaint was met only by a motion to dismiss supported by affidavits. It was at this stage of the contest that the lower court dismissed the complaint on the ground of lack of jurisdiction. The allegation should have been treated as admitted and therefore the motion to dismiss could be properly granted only if it were clearly apparent to the court that the plaintiff (appellant here) would not be entitled to the relief sought under any state of facts which could be proved in support of the specific claim. *Tahir Erk v. Glenn L. Martin Co.*, 4 Cir. 116 F. (2d) 865" 165 F. (2d) 236, 237.

Petitioner has not responded by answer to any of the allegations of the complaint. He has instead endeavored to make a motion to dismiss supported by affidavits serve the function of an answer. He has thus sought to deny the

following plain allegations of the complaint: (1) title to the coal in respondent and (2) no breach of the contract of sale by respondent. This he seeks to do by affidavits and to exclude any response to the misstatement contained therein by procedural surprise (Thirty-one pages of pleadings filed five minutes before the District Court hearing). Comment of the Court of Appeals thereon is significant:

> "The summary nature of the hearing preceding dismissal precluded the careful consideration to which appellant was entitled" 165 F. (2d) 235, 237.

Petitioner assumes the position he might have achieved by denial of some of the facts alleged in the complaint even though he has, in fact, demurred to the complaint and thus foreclosed the taking of any evidence on the points he now disputes. And now petitioner still seeks to prevent, by resort to sovereign immunity a prompt inquiry into the facts by preventing a remand to the District Court. Thus, while complaining of the urgency of getting on with the disposal of surplus, petitioner still seeks to prefer the second purchaser at the identical price over the first purchaser. And this despite the risk of total loss of the coal by spontaneous combustion and the certain loss of part of its heating value by the passage of even still more time.

INTRODUCTION TO ARGUMENT.

Petitioner has treated the issue of title *vel non* in respondent as unimportant. Therefore he discusses it last.[3] But, in law and in fact, every point made in the first 86 pages of his brief logically depends on the fallacy of his major premise that the coal is not respondent's property. Yet he frankly admits he regards title as unimportant at p. 79 of his brief:

> "Our entire argument as to sovereign immunity and as to equitable jurisdiction rests on the immateriality of respondent's substantive claims that title has passed

[3] Pet. Brief, pp. 86 through 94.

to it and that it duly performed its share of the contract. We believe that on both points it makes no difference whether title is now actually in the United States or in respondent . . . "

However, respondent believes that its ownership of this coal is the very heart of the case. Accordingly, respondent will first discuss the issue of title, under Section A(B, pp. 21 to 33, *infra*, and thereafter will reply *seriatim* to the other arguments of petitioner, which all depend upon petitioner's assumption of the central issue of title.

SUMMARY OF ARGUMENT IN CHIEF.

I. Respondent acquired legal title to its coal under a contract of purchase contemplated as the law of the land by both the Uniform Sales Act and the sovereign's disposal act. (Surplus Property Act of 1944.)

A. From the earliest day of the law merchant (*Tarling* v. *Baxter*, 6 B & C 360) whether passage of legal title is immediate under a contract transferring personal property, has depended upon the fundamental distinction between a "contract of sale" and a "contract to sell". Section 1 of the Sales Act in recognition and restatement thereof by definition has expressly provided for immediate passage of legal title under a "contract *of sale*." Petitioner, who drew the instant contract, expressly provided that it *was* a contract of sale and labeled it as such seven times therein. His claimed confusion of the two terms provided by law (by merging them into a conglomerate misunderstanding of meaning which he calls a "general sense") is difficult to understand from a skilled lawyer surrounded by eminently qualified professional talent. It is also rendered untenable because, as draftsman of the contract, petitioner resolved all doubt against himself. He cannot later cast his mistake upon an innocent party. Petitioner's own provisions in the contract for sales tax, stor-

age rental, resale for purchaser's account, etc., furnish conclusive reinforcement of the point.

B. Petitioner's motion to dismiss admits the immediate passage of legal title into respondent and this should have been taken as true (*Land* v. *Dollar*; *Tahir Erk* v. *Glenn L. Martin Co.* Validity of the rule is well demonstrated in cases arising under contracts to sell where the issue is locating exact time of passage of legal title. There the mere presence of any term which might furnish one or more indicia of constructive intent does not preclude full trial of and inquiry into the ultimate fact of title. In the absence of expressed intention, time of passage of title is revealed by the actual facts proved at trial. The cases cited by petitioner, which establish only that legally or physically impossible allegations are not admitted, do not derogate from the rule that title is a well pleaded ultimate fact determination of which if contested is dependent upon *all* the indicia for constructing an intention. Its validity becomes most obvious in cases of the instant type where (like *Land* v. *Dollar*) "jurisdiction is dependent on decision of the merits".

C. It is unnecessary to refer to the rules for ascertaining constructive intent under Section 19 of the Sales Act, because there was an express provision of intention—"contract of sale" etc.—in the instant contract. Moreover, Section 19 by its own terms applies only to "contracts to sell". But even if the instant contract had been one "to sell" and therefore governed by Section 19, legal title would still have passed immediately upon execution of the contract because Rule 1 provides as to "specific goods" in a "deliverable state" that "the property in the goods passes to the buyer when the contract is made and it is immaterial whether the time of payment or the time of delivery, or both, be postponed." The petitioner does not and cannot deny that the goods were specific, ascertained, and deliverable and that under the contract both payment and delivery were postponed until after its execution.

D. Petitioner's application of the indicia of Rule 5 of Section 19 of the Sales Act to the instant contract, is forbidden by the express provision of the rule which by its very first term is limited to "If the contract to sell . . ." Besides, the contract did not oblige petitioner to deliver the coal to respondent because, under the contract, respondent was to pay all freight and transportation cost; the rule by its own terms is limited to exactly the opposite situation which "requires the seller to deliver the goods . . . or to pay the freight or cost of transportation to the buyer." Petitioner's further claim that title was retained because of "insistence on cash payment on or before shipment", is manifestly erroneous and impossible under the contract. It provides that payment be made only after presentation of railroad weight tickets. These tickets cannot physically be prepared until after the coal is loaded on the railroad cars and on its way. Under exactly the same language in previous contracts, of which this was expressly made a continuing part, petitioner often did not receive payment until weeks after shipment.

II. Even though respondent were dependent solely upon equitable title to the coal and even though it had sought the remedy of both specific performance and mandatory relief, it would have been entitled to prevail. This is well settled not only under the broad rules of property, contract and tort, enunciated by the *Lee-Land* line of cases but also within the much narrower rule of the sovereign disposal authorities. Once the United States disposes of unique property, equitable title passes to the citizen. Despite the sovereign's retention of legal title to real property (which, of course, is always unique), real ownership is transferred from the public domain to the citizen. Thus the citizen owner of lands, acquired under contract from the sovereign, is entitled to the jurisdiction of equity to enjoin officers of the United States from a wrongful cancellation of his binding contract with the sovereign, and is also entitled to mandamus them, upon its relation, in order to force

legal title out of the sovereign. The general rules of property and trust go beyond this; they specifically enforce a citizen's contract with the sovereign by allowing pursuit of unique property, acquired from the sovereign under contract, even into the hands of a second purchaser from the sovereign although admittedly the sovereign had legal title at the time of the second conveyance. There is no distinction in legal consequences between a sale of unique personal property and a sale of real property. The Sales Statute, going a step beyond this, expressly allows specific performance for specific, ascertained and deliverable personality, regardless of unique character; this climaxes a long-standing trend toward recognition of the purchaser as the real owner, entitled to all the rights and remedies of an owner; while the seller is properly treated as a mere dry trustee.

SUMMARY OF REPLY ARGUMENT.

I. The basic error of petitioner's argument is, of course, reflected in his summary thereof beginning at page 16 of petitioner's brief. Under Point I A (dedicated to the general proposition that this is an unconsented suit against the United States) he takes the following liberty with the relief sought by the complaint. At the second line thereof, he asserts, "respondent has sought to compel specific performance of its sales agreement with the United States." But not such relief has been requested under the terms and language of the complaint. This is directed against the person of the defendant to enjoin and prohibit him from taking any future illegal and unauthorized action with respect to respondent's property. The Complaint asks only the maintenance of *status quo*. It seeks no affirmative action of any kind, nature or description even against the person of the defendant much less against the sovereign United States.

This same assertion that respondent seeks specific performance is repeated dozens of times throughout the brief.

Even a cursory examination of respondent's complaint and prayer for relief would disclose that no affirmative relief is sought in any form, much less that of specific performance.

I. A. In the same sub-section (I-A) of his summary, petitioner quotes general language of this Court in other cases without attempting to show how, where, why and when the language of these other cases should apply to the facts. The error of this is obvious from the language quoted itself—for instance, he purports that this case aims to forbid an officer of the United States from "the doing of those things which, if done, would be merely breaches of the contract" by the United States. But the act sought to be prevented here, namely conversion of respondent's coal, is a tort. Petitioner urges that, since he has general authority to act for the United States in the disposal of surplus, that this authority cloaks with immunity conversion of a citizen's property if connected therewith. He claims that his duty to construe contracts for disposal includes authority to "misconstrue" the rules of property with immunity. *Goldberg* v. *Daniels*, 231 U. S. 218, cited by petitioner as authority for this doctrine, nowhere purports to authorize the future commission of the tort by an officer and rests solely upon a finding that the property therein questioned belonged in fact to the United States on the state of the record.

This same sub-section, at both Pages 16 and 17, inferentially claims that the relief sought herein by respondent would compel the "War Assets Administrator in ordering his subordinates to load 10,000 tons of coal on freight cars in accordance with respondent's shipping instructions, and to accept payment as proferred by respondent." The relief prayed nowhere seeks such action.

Following that, at page 17, petitioner claims that respondent has argued that the suit is *less* one for specific performance because respondent "alleges that title to the coal has already passed to it." This involves a double error: (1) no specific performance has been asked and (2)

respondent urges its ownership rights against a proposed tort.

In sub-section B of Point I at page 17 of petitioner's summary of argument, petitioner urges that the *Lee-Land* line of cases do not control the instant case by assuming it is "an attempt to get specific performance of the contract to deliver property of the United States." Even if it had been specific performance against the United States and even were it conceded that the sovereign held legal title, this Court has repeatedly forced legal title out of the United States for the benefit of an equitable owner (See pp. 33 to 38, *infra*). The instant case, as noted *supra*, it is neither a suit for specific performance nor a case involving any property interest of the United States. By uncontested and well-pleaded allegation, as well as in fact, the coal is respondent's property.

Secondly, under this sub-section at page 17 he objects that respondent has not alleged that defendant is exceeding his "statutory or constitutional authority." The fact and allegations contained in the 5th, 12th and 14th paragraphs of the complaint (R. pp. 2, 6, 7) very clearly support the legal conclusion of an excess user of statutory authority—illegal conversion. Such a conclusion would not of course, have been well pleaded.

Under the next sub-section, I B, petitioner continues with the preposterous proposition that "contracting officials endowed with the breadth of statutory authority granted to War Assets Administration do not exceed their power *when they misconstrue the terms of an agreement.*" In other words, petitioner rests his case upon the theory that a public official has authority to misconstrue the law of property; is thus authorized to exceed his authority with respect to other peoples property, even to the extent of committing the tort of conversion thereupon; and that his views of property law, even if wrong, are not reviewable by the Courts.

As his third point under sub-section B, petitioner argues that respondent has neither asserted nor could assert a

private common law tort against petitioner in its complaint. Again, the respondent has "made a short and plain statement of the facts", in the 14th paragraph of its complaint establishing the threatened conversion (R. p. 7). This clearly supports the conclusion of law that petitioner's proposed action amounts to a tort. But, again, no conclusion of law can be well pleaded.

Under this same third point, petitioner, admitting the tort for purposes of argument, seeks to cast it upon subordinates rather than himself regardless of the actual fact; that he not only participated in it himself but helped to cause it as respondent can show at trial under the complaint. In any event, the present petitioner continues and has reaffirmed the joint wrong of his predecessor and himself, since he substituted himself in this litigation on his own motion in this Court. He has also shown that he fully knew of the facts of this case by filing an affidavit in the Court of Appeals one year ago.

In a fourth proposition of this same sub-section B on page 18, petitioner erroneously seeks to create a new rule under the *Lee-Land* cases, namely that before any citizen may protect his property rights from illegal invasion, he must have owned it for a long time and the United States must never have owned it at any time. A wrongfully continued possession is no more lawful than an illegal seizure. Compare *Land* v. *Dollar* with *United States* v. *Lee*. Also in the sovereign disposal cases (pp. 3 to 18 *infra*) in many instances the citizen *never* had possession, only the sovereign. Continuing in the same vein, petitioner undertakes an attack on the law of sales and the rules of property enunciated thereunder which have stood for thousands of years by characterizing them as "confusing" and "formal." Petitioner's attack on law so fundamental is clear revelation that the law is against him. At page 19 petitioner attempts to cloak his wrongful acts with the mantle of sovereign immunity, on the theory that any suit against him, a public officer, whether the suit be to prevent his wrongful acts or not, must necessarily involve the sovereign United States

merely because of his unpleaded assertion that he is acting in its behalf in claiming possession of respondent's property. Such argument must fail, inasmuch as the only interest the United States could have would be one in seeing its citizen's property protected and in seeing its wrongdoing officers prevented from commiting illegal acts in its name, . . . "and in case of an injury threatened by his illegal action, the officer cannot claim immunity from injunction process." *Philadelphia Co.* v. *Stimson*, 223 U. S. 620.

In sub-section C of Point I on page 19, after yet again erroneously assuming that this is a suit for specific performance, petitioner rests another erroneous assumption upon his first assumption; he asserts that this is a suit against the sovereign United States and that, therefore, it is " a suit directly involving the use, possession or title of property *in which the Government claims an interest.*" But the Government has not claimed an interest here and is not even a party to this suit; and the petitioner personally (defendant below) *has not answered or made any assertion of title either in himself or on behalf of any third party, including the sovereign United States* (unlike the situation in *Goldberg* v. *Daniels*). Nor is there anything in the complaint which would even slightly suggest the possibility of title in the United States. The properly pleaded and undenied allegation of title in respondent stands unshaken.

Sub-section D on Page 20 of Point I is dedicated to general support of the doctrine of sovereign immunity, ignoring the established judicial delimitation thereof, short of a power of arbitrary condemnation or seizure. Petitioner's attempt to substitute money damages under the Tucker Act ignores the fact that partial money damages would have been similarly available in the *Lee-Land* cases and other cases delimiting the doctrine.

At sub-section E of Point I on Page 21 of petitioner's brief he attempts to argue that mandamus would not lie in the instant case. Inasmuch as no mandamus has been requested here, no reply need be made to this except to draw attention to the fact that even if mandamus had been

asked to deliver the coal in question, there could be no more ministerial or non-executive act than loading coal.

At page 22 under Point II, petitioner undertakes to show that respondent has no right to equitable relief. His argument that the particular coal in this case is not unique on the pleadings is not only incorrect on the record (as the Court of Appeals has held); but it is a question of fact which has yet to be tried; and upon which respondent as yet has been denied the right to introduce its overwhelming evidence on the point because of the petitioner's speedy motion to dismiss. Since the rule of *Land* v. *Dollar* prevents petitioner from pleading facts in an affidavit accompanying a motion to dismiss, he has now adopted the unprecedented device of pleading allegations of fact in his brief, and in support, he offers hearsay.

Petitioner also pleads in this same paragraph that the respondent's damage can be calculated in terms of re-sale contracts. This overlooks the fact that, although a portion of the loss is measurable and therefore compensable in damages, a great portion of it is not. For this reason, a large portion of the damage is irreparable. Petitioner attempts reply neither to the irreparable nature of loss of trade reputation and good-will, nor to the multiplicity of suits necessarily involved should the tort be allowed to occur. His argument that the Court of Appeals has forfeited him of a trial of the fact of uniqueness is wholly imaginative inasmuch as the Court's decision was, by necessity, based only upon the pleadings before it (the complaint and motion to dismiss). The Court's judgment plainly remanded the cause to the District Court for a trial of all the facts.

Under Point III at page 23, petitioner seeks to argue the unpleaded answer that respondent breached its contract. The entire argument is premised upon petitioner's unsupported assertion of fact, namely that "the complaint (including exhibits) discloses that respondent breached the agreement by refusing to deposit $17,500 in cash with the designated Dallas Bank." Respondent was only required under the terms of the contract to make payments of cash

upon presentation of invoices and weight tickets as the coal was shipped. Respondent's terms of providing money only in time to cover these invoices of shipments were accepted in clear and unmistakable language by petitioner. He must of necessity have understood this from the previous contracts, which were specifically made a part of this contract, and under which previously that *very* same method of remittance had been used.

Complete ownership and legal title to the coal passed *instanter* into respondent by operation of law at the execution of the contract. Credit was provided. The indicia of title recited by petitioner have no application to a *sale* or *contract of sale* (*in presentæ*). Under the language of the statute, they apply only to *contract to sell* where legal title is to pass at some unspecified date *in futuro*. Even if this had been a *contract to sell* instead of a *contract of sale*, (as expressly provided seven times in the contract), the indicia of intention would still have passed legal title. Petitioner's enumerated indications of intention are erroneous as follows:

He argues "Insistence on cash payment on or before shipment." But payment was to be made and could be made only after shipment.

He urges "The inclusion of an f. o. b. shipping point term." This is rendered meaningless by the shipping point being one and the same as the origination point rather than some intermediate point. Moreover, the term could aid constructive intent only in a "Contract to Sell" which this was clearly not by express provision of the contract, making it a "Contract of Sale."

He urges "The distribution of risk so that the Government bore the risk until timely shipment." The only provision was a limitation of risk, not an assumption thereof, and one equally useful whoever bears ownership risk, since in any event it limits their risk from negligence or fault.

An express provision assuming general risk in the contract, would merely indicate an abnormal shift of risk as, without it, risk would have been on the purchaser.

He urges "The word *sale* or *contract of sale*" was used in a loose commercial "general sense." But words of legal significance and connotation in a formal document can only be accepted in the legal sense in which they were used, namely, immediate passage of title, and could never be used in some "general" sense, which meaning would be exactly contrary to their definition by statute, which would defeat the automatic operation thereof.

A. ARGUMENT IN CHIEF.

I. Respondent Has Title to the Coal.

A. The parties have conclusively manifested an intention that legal title should pass instantly at the time of making the contract, as evidenced by its express words of art defined expressly in Section 1 of the Sales Act.

The petitioner in his standard form denominated "sales memorandum" (Complaint, Exhibit E) has used words of art which from the earliest days of the law merchant have indicated an intention to pass legal title instantly. This sales memorandum (Complaint, Exhibit D) contains no less than seven references to itself as a *contract of sale* or a *sale*. At no place in this document was there any reference to itself as a *contract to sell*. Since the early law merchant at the common law, going bask to *Tarling v. Baxter*, 6 B and C 360, there has been a fundamental distinction between a sale *in praesenti* and a sale *in futuro*. It is an elementary proposition that "contract of sale" and "contract to sell" are words of art, having definite and concise meaning, used habitually to distinguish between immediate passage of title and a mere agreement to pass title at some time in the future. The Uniform Sales Act has declared and restated this in unmistakable terms in Section 1 which appears at Tit. 28, Sec. 1101, D. C. Code (1940).

> (1) A *contract to sell goods* is a contract whereby the seller agrees to transfer the property in goods to the buyer for a consideration called the 'price'.

> "(1) *A sale* of goods is an agreement whereby the seller transfers the property in goods to the buyer for a consideration called the 'price'. (Italics supplied.)

Language, and the holding, in *United States* v. *Amalgamated Sugar Company*, 72 F. 2d 755 (C. C. A. 10th, 1931) are squarely in point:

> "... Each contract refers to the transaction as a sale, not an agreement to sell at a future time. That is persuasive." *Id* at 757.

There could be no clearer method of determining whether a contract of sale or a contract to sell was intended by the parties than examining their contract to see what those parties expressly provided therein. The Court concluded that title passed at the time of making the contract.

Petitioner now claims that he employed these words of specific, technical and definite legal meaning in the contract in a loose commercial or "general sense" (p. 92, Pet. Brief). It is difficult to believe that petitioner, a lawyer himself, and the then general counsel of the War Assets Administration, where he would naturally be surrounded with skilled legal draftsmen, would not know the difference between a "contract to sell" and a "contract of sale." But this is beside the point, inasmuch as he cannot now cast the fault of his mistake (or ignorance of the law) upon an innocent party. Even if any doubt existed, his contract, in case of ambiguity should be construed against him, inasmuch as he drew it. Moreover, he has accompanied "contract of sale" consistently with other language indicative of intention to make a present sale. The face of the sales memorandum itself (R. p. 15) bears the words "*sold to* Domestic and Foreign Commerce Corporation." Furthermore there is on the face of the document a space for the insertion of the sum due from the purchaser denominated "*sales tax.*" Are we to assume that a sales tax would be due on a mere contract to sell in future? Thus by the use of words of art, stronger than any used in *United States* v. *Amalgamated*

Sugar Company, 72 F. (2d) 755, (C. C. A. 10th, 1931), the petitioner passed title to the respondent, Domestic and Foreign Commerce Corporation. The intention of the petitioner was clear and unambiguously expressed. The Sales Statute operated upon his language immediately and instantly put legal title into respondent. This conclusion is reinforced by his right (No. 1 of the conditions of sale), to *"store the property elsewhere for the account and at the expense of the purchaser"*; also "to demand the payment of reasonable storage charges." A further indication of the intention of the War assets Administrator is the right he has reserved to *"resell"* the property in question *"for the account of purchaser"* under certain conditions (middle of par. 7, Exhibit 7, R. p. 16). If no sale has taken place there can be no re-sale.

If, despite all this, there were any ambiguity of intention we urge that this is a contract drawn by defendant. It should be construed against him even if there had been ambiguity.

It is submitted that these words of art are certainly sufficient to support the specific allegation that legal title had passed against a motion to dismiss, and in fact conclusively shows that title was passed to the Domestic and Foreign Commerce Corporation at the time of making the contract.

B. The complaint alleged that title had passed to the plaintiff and this should have been taken as true.

As the Court of Appeals correctly ruled (R. p. 57) the allegation of title had to be taken as true on motion to dismiss in the premises. *Tahir Erk* v. *Glenn L. Martin Co.*, 116 F. 2d 865 (4 Cir). Petitioner argues that the sales memorandum, a part of the complaint, had terms implying the contrary, i. e., a "contract to sell" (Pet. Brief, pp. 86 through 91) and that, for this reason the specific allegation should be disregarded.

This is erroneous. First, as we have shown, *supra* (p. 21) the terms of the sales memorandum conclusively place legal

title in respondent. But even if this were not so, and assuming merely equitable title for this phase of the argument, much probative evidence, often outside the contract itself, may be admissible before the ultimate fact of exact time of passage of legal title may properly be determined. In all these cases which involve unique property equitable title is unquestionably in the buyer and the only issue joined is determining time of passage of legal title in order to distribute risk of loss. In these "contract to sell" (in futuro) cases it is well settled that the intention of the parties governs the passage of title. On the issue of exact time of passage of legal title if controverted, a party is entitled to show ". . . the actual intent of the parties . . . from the terms of the contract, the conduct of the parties, and all the circumstances of the case." (*Brown Lumber Co., Inc.* v. *Commissioner of Internal Revenue*, 59 App. D. C. 110, 35 F. 2d. 880, 882 (1929). The mere presence of any given term should not preclude inquiring into the ultimate fact of title.

> "Neither the presumption created by Rule 5 of the Uniform Sales Act nor the accepted connotation of the term 'f. o. b.' can, of itself, control the result. The prepayment of freight and the use of the term 'f. o. b.' are only two of the facts to be given consideration in determining the time and place at which the parties intended to pass title. The answer, as we have seen, must be found in other facts showing the actual intention of the parties." (*Electric Storage Battery Company* v. *District of Columbia*, 155 F. 2d 867, 870 (App. D. C. 1946).

See also *Secor* v. *Tompkins Co.* 45 A (2d) 117 (D. C. Mun. App. 1946).

It is for this reason that an allegation of title is well pleaded, amounting to an allegation of ultimate fact. In re *Noble*, 21 F. Supp. 840 (D. W. D. N. Y. 1937). *McAllister* v. *Kuhn*, 96 U. S. 87 (1878).

Cases cited by respondent (Br. p. 87) do not derogate from this well known rule. Some are cases of absurd allegations known to be impossible under the doctrine of ju-

dicial notice: e. g., in *Noritz* v. *United States*, 294 U. S. 317, an allegation that monetary gold had a market value of X dollars per ounce, when there was no legal market for such gold in the United States; in *United States* v. *John J. Felin and Co. Inc.*, 334 U. S. 624, that the "replacement value" of an item was in excess of the maximum legal price at which it could be sold under OPA. Some are, e. g., *Newport News Shipbuilding Co.* v. *Echaumier*, an allegation of a pure conclusion of law "Plaintiff not engaged in interstate commerce."

But an allegation of title, as we have shown, has long been well settled to be a well-pleaded ultimate fact, neither impossible nor so presumptive of the court's legal analysis of the facts as to amount to a conclusion of law. It is, indeed, an ideal allegation for the purpose of reaching a triable issue.

Just as in *Land* v. *Dollar* (Sup. Court, U. S. No. 207, O. T. 1946, decided Apr. 7, 1947):

> "Although as a general rule the District Court would have authority to consider questions of jurisdiction on the basis of affidavits as well as the pleadings, this is the type of case where the question of jurisdiction is dependent on decision of the merits."

Thus respondent was entitled to have his allegation of title taken as true since the question on the merits, whether title had passed to respondent, controlled also the question of jurisdiction.

C. Only if the parties had not previously expressed their intention of making a present sale would it be necessary to have reference to the rules of constructive intent provided in the Uniform Sales Act, but even in that event Rule I of Section 19 clearly indicates that legal title passed at the time the contract was made.

It sees to the respondent entirely unnecessary to refer to the rules provided at common law and restated in the Uniform Sales Act for the ascertaining of constructive intent as to the passage of title because intent already had

been clearly expressed. As outlined above the words of art (defined in Sec. I of the Uniform Sales Act, D. C. Code, 1940, Tit. 28, Sec. 1101) used by the appellee in its contract reveal an expressed actual intent to effect a present sale rather than a contract to sell. Even if reference is had, however to the laws of ascertaining constructive intention as to exact time of passage of legal title, where none is expressed, rule I provides:

> "Unless a different intention appears, the following are rules for ascertaining the intention of the parties as to the time at which the property in the goods is to pass to the buyer:
>
> Rule 1. Where is an unconditional *contract to sell* specific goods in a deliverable state, the property in the goods passes to the buyer when the contract is made and it is immaterial whether the time of payment or the time of delivery, or both, be postponed." (Tit. 28-1203, D. C. Code, 1940). (Italics supplied.)

It is to be noted that the italicized provision of the section make it applicable to only "contracts to sell." But even if a contract to sell title would have proved upon execution of the contract here.

A case squarely in point is *Nashville Industrial Corp. and Technical Economist Corp.* v. *United States*, 71 Ct. Cl. 405 (1941). This case is almost amazing in its similarity to the present one in that it involved surplus property disposal after the first World War. The government was attempting to contend that title had not passed to the purchaser. The contract read:

> "The seller agrees *to sell*, and the purchaser agrees to purchase, the following described property at prices and on the terms hereinafter set out:
>
> "Eighty-five (85) Werner & Pfleiderer, Type VI, size 15, Glass B. B. jacketed, mixing machines at a unit price of six hundred fifty ($650) each, *f.o.b. cars* Old Hickory, Tennessee, or a total consideration of fifty-five thousand two hundred and fifty dollars ($55,250) for the eighty-five (85) machines. * * * *" *Id.* at 406 (Italics supplied.)

The Court ruled that title passed to the purchaser from the government showing that both under the common law and the Uniform Sales Act title has passed at the time of making the contract. The Court cited Rule I, *supra*, and used the following language:

"Standard authorities also show that where there is no manifestation of intention, except what arises from the terms of sale, the presumption is, if the thing to be sold is specified and it is ready for immediate delivery, that the contract is an actual sale, unless there is something in the subject matter or attendant circumstances to indicate a different intention. Well-founded doubt upon that subject can not be entertained if the terms of bargain and sale, including the price are explicit." *Id.* at 418.

"Modern decisions of the most recent date support the proposition that a contract for the sale of specific ascertained goods vests the property immediately in the buyer and that it gives to the seller a right to the price, unless it is shown that such was not the intention of the parties. *Gilmore* v. *Supple*, 11 Moore P. C. C. 55, Benjamin, Sales (2d Ed.) 280; *Dunlop* v. *Lambert*, 6 Cl. & Fin. 600; *Calcutta Co.* v. *DeMattos*, 32 Law J. Rep. N. S. Q. B. 322-338." *Id.* at 418.

"The contract we are considering relates to the sale and purchase of specific goods. The price is explicitly stated. The goods to be transferred are in a deliverable state, nothing remaining to be done to them prior to their delivery.

"We think the agreement was an unconditional contract of sale and that the title to the property sold vested in the vendee, the Technical Economist Corporation upon the execution of the contract. There is nothing in any of the provisions of the contract which shows a contrary intent of the parties. * * *. *Id.* at 418.

"Under the rule laid down by the decisions above cited, as well as by the plain and unqualified language of the Tennessee uniform sales law, the fact that the time of payment, or the time of delivery, or both be postponed, is immaterial as to the immediate passing of title to the buyer in goods sold under an unconditional contract of sale of specific goods in a deliverable state." *Id.* at 419.

The coal in this case constitutes specific, ascertained, and deliverable goods described as:

> "Stove size, mined near Henryetta, Oklahoma; mining company, moisture content, volatile matter fixed carbon percent, ash percent, B. T. U.'s per pound and ash fusion temperature are unknown. Stored outside on ground in three windrows, for approximately three years, adjacent to a switch track of Frisco line."

in the petitioner's original letter of invitation (Exhibit A of the complaint, R. p. 10).

D. Petitioner's claimed indicia of time of title passage are without merit because they can neither repeal nor override Section 1 or 19 of the Act.

Petitioner relies upon three points as indicia of his title to overcome this showing of title in respondent and the plain undenied allegation thereof (p. 91, Brief for Petitioner).

These are: (a) The Free on Board provision of the contract, and an erroneous belief that *any* Free on Board provision retains title regardless of other factors; (b) claimed risk of loss on seller; (c) the claimed (and as we have shown, *infra*, pp. 69-70), erroneous terms "cash in advance of shipment."

Rule 5 of the Uniform Sales Act, on which petitioner relies for his F. O. B. argument provides:

> "*If the contract to sell* require the *seller to deliver* the goods to the buyer, or at a particular place, or to *pay the freight or cost of transportation to the buyer*, or to a particular place, the property does not pass until the goods have been delivered to the buyer or reached the place agreed upon. (Mar. 17, 1937, 50 Stat. 33, ch. 43, Sec. 19)." Tit. 28, Sec. 1203, D. C. Code (italics supplied).

Petitioner contends that the provision in the contract for loading "f. o. b." cars (here *at location*) is sufficient to bring this contract within the situation contemplated by

Rule 5. Two errors should be noted, however. The first is that Rule 5 is specifically limited by its own terms to a "contract to sell." A contract to sell is defined in the very beginning of the Sales Act, Tit. 28, Sec. 1101, D. C. Code, 1940, as:

> "(1) *A contract to sell* goods is a contract whereby the seller *agrees to transfer* the property in goods to the buyer for a consideration called the 'price'." (Italics supplied.)

Thus it may be seen that Rule 5 never becomes applicable until you first determine (e. g., because the goods involved are future goods) that a sale has not taken place earlier in the negotiations. In other words, the use of Rule 5 by the petitioner assumes the very point to be proved, namely the sales memorandum was not a present sale but a contract to sell at a future date. The very purpose and utility of Rule 5 is to take care of the situation where title has not passed at the time of making the contract and to provide a convenient cut-off point *where the parties have not expressed themselves* as to the exact point in the future at which title shall pass in making their contract to sell.

The second error is a confusion of F. O. B. location contracts with other F. O. B. contracts.

Whitney on Sales (3rd Ed. 1941) Secs. 75 and 91, clearly explains that Rule 1 controls in a supposed conflict with Rule 5 in f. o. b. location contracts for specific goods (as distinguished from f. o. b. *destination* or *intermediate* place contracts) in the following language:

From Sec. 75:

> "The apparent contradiction between the two sections," (Rule 1 and Rule 5) "may be removed by construing the term 'delivery' in Rule 1 to cover the case where the buyer is taking delivery from the seller's place of business, the transportation being made by the buyer, and by construing the term 'delivery' in Rule 5, to cover the case where the seller is to transport the goods from his place either to the buyer's place or to a place named by the buyer."

From Sec. 91:

"The letters f. o. b. stands for the words 'free on board' and means that the seller is to put the goods on board cars or boat for the buyer without any expense to the buyer such as cartage lighterage, stevedoring, etc.—and that thereafter the buyer is to bear the cost of transportation to the point of destination—in other words that the buyer must pay the freight. Under a contract to sell f. o. b. point of shipment, it is no part of the seller's duty to prepay the freight, *therefore* the provision of Rule 5 does not apply to f. o. b. shipping point contracts." (Italics supplied.)

Petitioner states: "It is one of the guiding rules of sales law that, absent of contrary intention expressly appearing, a provision for delivery f. o. b. point of shipment is the strongest evidence of intention to pass title to the buyer at that time, *and not before*, the goods are delivered by the seller to the carrier and placed on board the freight cars." (Italics supplied.) Pet. Brief, p. 88.

His cases stand for the reverse: That title passes *not later* than the f. o. b. point. His misapprehension must arise from a hasty reading of the cases which he cites. Most of them contain general language to the effect that title passes at the f. o. b. point. What has been overlooked is that they fall into two classifications: (1) future or unascertained goods cases and (2) loss in transit cases.

In the first type, namely cases where the goods were future or unascertained at the time of the contract, title manifestly cannot pass until specific goods are appropriated to the contract—e. g., a sale of coal by description of grade. The second type consists of f. o. b. shipping point *loss in transit cases*, such as *Ehrenberg v. Guerrero*, and *Nelson Brothers Coal Co.* v. *Perryman-Burns Coal Co.* In a loss in transit case, no party has any interest in proving that title passed at any time prior to the f. o. b. point. It is sufficient for seller that title pass f. o. b. shipping point. Of course, buyer's contention is that it does not pass until destination.

There are two reasons for a scarcity of cases on the supposed conflict between Rule 1 and Rule 5. First it is most unusual to sell specific goods F. O. B. The sale of specific or ascertained goods is normally a retail sale. The parties are present and nothing remains to be done but remove the property from the store or other place of business. The typical F. O. B. sale is a sale by a wholesaler, by a manufacturer or other dealer who sells by description and agrees to make delivery F. O. B. some point or other. Then, of course, courts seize on the point at which he appropriates particular goods to the particular contract by delivery as the convenient point for the passage of title, in the absence of expressed intention.

Second, so obvious is the fact that Rule 1 controls apparent conflicts between Rule 1 and Rule 5, that cases where the point has even been raised are exceedingly scarce. In other words, lawyers and parties do not normally contest, in the case of specific or ascertained goods, the undoubted rule that title passes at the moment the contract is made. The principle of Rule 1 has controlled the only two cases which deal with the point, but which settle the law upon it, which are *Brown Lumber Co. Inc.* v. *Commissioner of Internal Revenue, supra,* and *Central Railroad Co.* v. *Berry*; 165 N. Y. Supp. 104, 99 Misc. 560.

With respect to the risk of loss, petitioner is equally in error. Petitioner gratuitously assumes that general risk of loss is on seller "until shipment" herein, and urges this as an indication of his title. Who bears the general risk or loss is not specifically covered by the contract in any way. *It must be deduced from the location of title.* The provision in the contract of sale is:

In case of loss prior to removal or shipment,

> "seller's liability shall, at election of seller, be *limited* to the replacement of the property lost, damaged, or destroyed, or refunding any amount paid by the purchaser therefor." (R. p. 17, par. 6.)

The words used are words of limitation. They do not create any new liability. They limit whatever liability otherwise exists.

This limitation is equally useful to the defendant whether title has passed or whether title has not passed. If title has passed, as we contend, the seller in possession is still liable for destruction of the goods by his fault and the measure of damages would, of course, be the fair market value at the time destroyed.

This is a useful *limitation* of the normal liability ("market value") which defendant would have if he caused the loss, damage or destruction of the coal. It is very clearly *not* an *assumption* of general risk.

Even if there were a provision for the assumption of general risk by seller, as counsel for petitioner claims, that would point to prior passage of title. The presence of an express assumption of risk by seller is superfluous where seller has retained title, because of the elementary rule that risk follows title in the absence of express provision. Therefore the express assumption of general risk by seller could only tend to show that title had passed to buyer as otherwise there would be absolutely no need expressly to assume the risk that seller bore by operation of law.

Counsel misreads the axiom that general risk of loss follows title and is proceeding upon the fallacious theory that therefore title follows risk of loss.

With respect to the claimed insistence on cash payment in advance of shipment, there is simply no support whatever in the contract for this position. Whatever affect such a term might have as to title is immaterial. The contract term "cash on presentation of railroad weight tickets as shipped" absolutely precluded payment before shipment, and amounts to substantial credit (well justified by experience under the 1946 contract). Railway weights could not possibly have been presented at Dallas for many days after the contract, and some considerable time after loading *and shipment*.[4]

[4] Under the earlier contracts, weight tickets, and therefore payment, were often delayed for weeks by railroad procedure before arriving at Dallas.

A. II. Ownership in Respondent, Legal or Equitable, Requires the Prevention of Conversion.

Irrespective of the foregoing argument, which concerns only the exact time of passage of *legal* title, petitioner has indirectly conceded respondent's equitable title. He argues (at pp. 87 through 93 of his brief) that the contract was a "contract to sell" rather than a "contract of sale" (as it was plainly labeled). Also (at p. 35 of his brief, line 19) in speaking of Respondent's interest which he erroneously claims could only support equitable specific performance, he says "since it (respondent) *already* has title" (Bracketed word and emphasis supplied).

Thus the complete ownership of the coal is in respondent, regardless of exact location of legal title. From the standpoint of property interest, a binding "contract to sell" which bases legal title *in futuro*, instantly passes equitable title to unique property. Thus, in arguing that the sales memorandum was a contract to sell, petitioner logically must concede that respondent has equitable title to its coal. Even if respondent had brought mandamus and asked specific performance, it is well settled that specific performance will lie against officers of the United States (by mandamus) to force legal title out of the sovereign United States for a certain type of unique property, namely, public land and also that its officers will be enjoined from the illegal cancellation of a valid United States disposal contract for unique property. Thus, a citizen who has accepted an offer of the United States by performance (or as tender thereof) under a Public Land disposal patent, or grant, statute, can have performance of that offer where it has ripened into contract by virtue of the citizen's acceptance. *Payne* v. *Central Pacific Ry. Co.*, 255 U. S. 228; *Payne* v. *New Mexico*, 255 U. S. 367; *Santa Fe Pac. R. R. Co.* v. *Fall*, 259 U. S. 197; *Lane* v. *Hoglund*, *supra*; *Weyerhauser* v. *Hoyt*, 219 U. S. 380; *Benson Min. & Smelting Co.* v. *Alta Min. & Smelting Co.*, 145 U. S. 428; *Hughes* v. *Moore*, 7 Cranch, 176; *Ballinger* v. *United States, ex rel.*

Frost, 216 U. S. 240; *United States ex rel. McBride* v. *Schurz*, 102 U. S. 378; *Payne* v. *United States ex rel. Newton*, 225 U. S. 438; *Montana Catholic Missions* v. *Missoula County*, 200 U. S. 118; *Stark* v. *Starr*, 6 Wall. 402; *Barney* v. *Dolph*, 97 U. S. 652; *Wisconsin C. R. Co.* v. *Price County*, 133 U. S. 496.

This Court in *Payne* v. *Central Pac. Ry. Co.*, *supra*, unanimously disposed of a contention of sovereign immunity upon the sole ground of finding equitable title in the citizen, as follows:

> "We are asked to say that this is a suit against the United States and therefore not maintainable without its consent, but we think the suit is one to restrain the appellants from canceling a valid indemnity selection through a mistaken conception of their authority and thereby casting a cloud on the plaintiff's title. *Ballinger* v. *Frost*, 216 U. S. 240; *Philadelphia Co.* v. *Stimson*, 223 U. S. 605, 619-620; *Lane* v. *Watts*, 234 U. S. 525, 540." (255 U. S. at 233)

> "Rightly speaking, the selection is not to be likened to the initial step of one who wishes to obtain the title to public land by future compliance with the law, but rather to the concluding step of one who by full compliance has earned the right to receive the title." (255 U. S. at 234)

The court then referred to a similar grant and quoted from *Burke* v. *So. Pacific R. R. Co.*, 234 U.S. 669 at 679-680:

> "...The company was at liberty to accept or reject the proposal. It accepted in the mode contemplated by the act, and thereby the parties were brought into such contractual relations that the terms of the proposal became obligatory on both. *Menotti* v. *Dillon*, 167 U. S. 703, 721. And when, by constructing the road and putting it in operation, the company performed its part of the contract, it became entitled to performance by the Government. In other words, it earned the right to the lands described." (255 U. S. 235)

The point was further elucidated in *Payne* v. *New Mexico, supra*, where the court, after referring to the state's alternative selection of indemnity lands, held this to be acceptance of the sovereign's offer of contract by the following which passed equitable title to the state:

> "Acceptance of such a proposal and compliance with its terms confers a vested right in the selected land which the land officers cannot lawfully cancel or disregard. In this respect the provision under which the State proceeded does not differ from other land laws which offer a conveyance of the title to those who accept and fully comply with their terms.
>
> "In the brief for the officers it is frankly and rightly conceded to be well settled that 'a claimant to public land who has done all that is required under the law to perfect his claim acquires rights against the Government and that his right to a legal title is to be determined as of that time'; and also that this rule 'is based upon the theory that by virtue of his compliance with the requirements he has an equitable title to the land; that in equty it is his and the Government holds it in trust for him.' See *Lytle* v. *Arkansas*, 9 How. 314, 333; *Stark* v. *Starrs*, 6 Wall 402, 417-418; *Ard* v. *Brandon*, 156 U. S. 537, 543; *Payne* v. *Central Pacific Ry. Co., ante*, 228."

This Court after again referring to the contract and property status of a purchaser from the sovereign quoted with approval from the opinion of the Secretary of the Interior in the case of *Gideon F. McDonald*, 30 L. D. 124, as follows:

> "'Mr. McDonald accepted the standing offer or proposal of the government contained in the act of June 4, 1897, and complied with its conditions, thereby converting the mere offer or proposal of the government into a contract fully executed upon his part, and in the execution of which by the government he had a vested right. After McDonald had fully complied with the terms on which the government by said act had declared its willingness to be bound, no act of either the executive or legislative branch of the government could

divest him of the right thereby acquired." (255 U. S. 372)

Thus it is shown that the instant case is not only well within the property, contract, and tort rules founded upon the *Lee-Land* line of authorities, but it is, in addition, well within the much narrower doctrine of sovereign property disposal enunciated by the above line of cases controlling the pursuit of a citizen's unique property acquired directly and immediately from the sovereign.

Moreover, the superiority of the general rule of property and trust over an erroneous claim of title by officers of the United States goes beyond these cases. This Court has uniformly compelled specific performance of disposal contracts of the United States not only by enjoining its officers from cancelling its valid disposal contracts, as in the above cases, but also by repeatedly allowing a purchaser from the sovereign United States to pursue his unique property even into the hands of a subsequent purchaser from the United States. In all of these cases, it is, of course, necessary to call into question and examine the supposed title of the United States upon which the second purchaser must rely. Also, it must always be conceded, not only that the United States had both full legal and equitable title at one time, but that the United States had record title at the time of the conveyance to the second purchaser. A leading case of this line[5] is *Cornelius v. Kessel*, 128 U. S. 457, 32 L. ed. 482, in which this Court by a unanimous bench stated the rule in unmistakable terms.

The first purchaser (who was *out* of possession, it is to be noted) brought ejectment against the second purchaser for the land to which he was equitably entitled. The court

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[5] *Hawley* v. *Dillar*, 178 U. S. 476; *El Paso Brick Co.* v. *McKnight*, 233 U. S. 250; *Cunningham* v. *Ashley*, 14 How. 377; *Hughes* v. *United States*, 4 Wall. 232; *Rector* v. *Gibson*, 111 U. S. 276; *Bernier* v. *Bernier*, 147 U. S. 242; *Hedrick* v. *Atchison, T. & S. F. R. Co.*, 167 C. S. 673.

first dealt with the contract rights acquired under the entry which the first purchaser had made at one time against the United States. This the Secretary of the Interior or Land Commissioner had purported to cancel in order to give the property to a second purchaser (just as the War Assets Administrator here purports to cancel the instant contract for the benefit of a second purchaser). At p. 460, id., the Court said:

> "When the tract which was subject to entry was thus purchased and paid for, it *ceased* to be subject to the *disposal* of the United States; it was *not* in equity *their property*. The *legal* title, it is true was retained by them, but they held it as trustee, *for the benefit of the purchaser*, and they were *bound* upon proper application to issue to him a patent therefor." (Emphasis supplied)

By the latter language it is clear that the court would have either compelled specific performance against the sovereign upon its relation or enjoined an illegal cancellation by its officers as readily as if enforced specific performance against the third party conveyee of the sovereign.

There was also present a second factor in that case which is exactly similar to that which petitioner seeks to inject into the instant case, namely,—an officer's authority to cancel a contract of the United States. The court went on to dispose of the claimed right of discretion of the Secretary of the Interior or Land Commissioner to cancel the entry (which was a part of the consideration moving to the United States) by the following:

> "It [the proper and lawful exercise of authority and discretion] cannot be exercised so as to deprive any person of land lawfully entered and paid for. By such entry and payment the purchaser secures a vested interest in the property and a *right* to a patent therefor; and can no more be deprived of it by order of the Land Commissioner than he can be deprived by such order of *any other* lawfully acquired property." (*Id.* at 461, bracketed material and emphasis supplied)

Exactly the same reasoning, although in different language, was perceived to apply to the instant case by the Court of Appeals below when it disposed of petitioner's claimed discretionary authority to exceed his authority by concluding (at p. 74, Sp. App.) that the discretion which petitioner had before acceptance had already been exercised and exhausted when he executed the final disposal contract to respondent.

Petitioner has not even attempted to show that the same rule which applies to Real Estate (which is always unique) does not apply to unique chattels. Indeed, courts of equity have, since their foundation, been applying the same fundamental rule to all unique property whether it be real or personal. It is hornbook law that the equitable owner of unique property has an absolute right to resort to the jurisdiction of equity to compel both relinquishment of wrongful possession and conveyance of the legal title to his property. The Sales Act even carries the principle a step further by allowing specific performance even where the chattel sold is *not* unique as shown by Section 68 of the Sales Statute (District of Columbia Code):

> "§ 28-1506 [11:128]. Action for specific performance.
>
> "Where the seller has broken a contract to deliver specific or ascertained goods, a court having the powers of a court of equity may, if it thinks fit, on the application of the buyer, by its judgment or decree direct that the contract shall be performed specifically, without giving the seller the option of retaining the goods on payment of damages. The judgment or decree may be unconditional or upon such terms and conditions as to damages, payment of the price, and otherwise, as to the court may seem just. (March 17, 1937, 50 Stat. 45, ch. 43, § 68.)"

B. Reply Argument to Body of Petitioner's Argument.

I. This is not a suit against the United States.

Under I, at page 24 of his brief, petitioner prefaces his remarks with comment indicating that he neither understands the application of the law of sovereign immunity,

nor that it has for years been confined to its proper sphere of shielding only the executive discretionary and authorized acts of public officers. He does not seem to recognize that the doctrine of sovereign immunity under our form of government is but a small part of the great body of the law, and that its operation is properly confined to the protection of the lawful acts of Government officials in their executive and discretionary functions. In a free society the doctrine cannot impinge other fundamental rights of property and person.

Petitioner's comment that "in the present climate of opinion" a plea by the Government to turn the Respondent out of court for bringing what he terms "an unconsented suit against the United States" may initially seem "distasteful" can only be taken as an indication of his failure to recognize the whole line of cases judicially delimiting sovereign immunity from *United States* v. *Lee* to *Land* v. *Dollar*. His avowed purpose in this case "we have interposed and steadfastly maintained that defense (sovereign immunity) because we believe it to be warranted",[6] etc., is indicative of a desire to continue the use of motions to dismiss in defending cases of the instant type despite the long-standing authorities. In justification of this he can offer only a generalization that the doctrine should be sustained "*in this instance* by the *demands of the public interest* and confirmed by the *general congressional* legislation partially lifting the immunity bar." (Italics supplied.)

I A. *The suit is not one for specific performance of a contract of the United States, but one to prevent interference with respondent's property, title to which happened to be derived from a contract of sale earlier made by the United States.*

The Complaint shows that it does not seek specific performance and does not even seek affirmative relief.

Under I A (1), Page 25, Petitioner claims that the "face of the complaint shows that in all but the defendant's name,

[6] At p. 24, Pet. Brief.

the suit is one to compel specific performance by the United States." There are two difficulties with this assertion, the first of which is that this complaint does not seek to compel the United States to take any action at all much less any affirmative action; the second difficulty is that this complaint does not seek to compel the Petitioner to take any affirmative action of any kind, nature, or description, but only to desist from unlawful interference with the property of a citizen, and refrain from committing conversion. (R. pp. 8, 9.)

In the second sentence of I A (1) at page 25, Petitioner plainly concedes that the United States has no interest in the coal in question by admitting that the coal was *sold* by the United States. He says "the coal *was* admittedly the property, and in the possession, of the United States, which has *duly entered* into a conventional *contract* for its *disposal*." If it duly entered into a disposition contract (as it unquestionably did) and as Petitioner says, it must have disposed of the coal, and how could it thereafter assert any property interest in the coal. "Disposed" means "sold," "parted title with." Petitioner later denies that the coal was disposed of at all; that the contract of sale or disposal was of any legal significance and that the solemn covenant of the sovereign means anything at all in passing title to respondent (either legal or equitable). Nonetheless, this significant admission is most revealing of the true legal nature of the situation.

On Page 26, under the same point (I A 1) in urging the proposition that Respondent breached a contractual obligation, he asserts that there was a contractual obligation on its part "to make a single cash deposit in a Dallas Bank." There was no such obligation in the contract, a point which will be taken up at Page 68, *infra*, under the subject of Breach (Sec. III). Following this, at page 26 petitioner attempts to infer that the fact that the suit was brought against his person as head of a Government agency somehow makes the United States a party to the

case.[7] In describing the capacity in which the defendant functioned, and admittedly now purports to function, it was necessary on the principles of the law of agency, to use words *descriptioni personae* to describe his dual offices held by the person of the Defendant in order that he could not claim the authority of the other office in the event that his capacity was described in terms of only one office. By the same principle it was also necessary to prevent the situation where, in the event of no description of his offices, he could claim that the official capacity of his person would be unaffected by any decree which did not describe the capacity in which he purported to function.

On Page 26, Petitioner then objects that it was not charged that "either he or his subordinates were acting beyond *the scope of* their statutory or constitutional authority." As this is a conclusion of law, it would not be well pleaded and as a matter of fact (Complaint, paragraphs 5 12 and 14, R. pages 2, 6, 7) was sufficiently pleaded by the factual allegations upon which to base this legal conclusion.

Thereafter, at page 27, Petitioner charges that Respondent's "whole effort is plainly to compel the War Assets Administrator, as an official of the United States, to fulfill the United States' contract by officially ordering his subordinates to load the ten thousand tons of coal upon receipt of Respondent's shipping orders." As shown by the footnoted quotation of the Complainant's prayer, (footnote 16, Page 27) Petitioner relies for this extravagant claim on something which shows plainly that the only thing that could be realized by the decree was that "Plaintiff *have* thirty days from the date of the court's final order in which to *give* shipping instructions". (Italics

[7] It is significant that in footnote 14 at the same page, Petitioner confines his argument to a claim that the War Assets *Administration* not the person of the *Administrator* is "an administrative unit of the United States". He seems to base his entire argument that words *descriptioni personae* cannot be used in describing the capacity of the person of the administrator on the theory that Congress has not made the "Administration suable". He also overlooks that cases against the Secretary of the Interior have been captioned in the same way.

supplied.) It plainly did not attempt to enjoin the *acceptance* of such shipping instructions but only sought to allow thirty days in which they could be *given* under the contract without breach.

The essence of petitioner's contention in this section of his brief is as follows: the interference with respondent's property is a breach of respondent's contract with the United States and therefore, a decree against the interference is in effect a decree of specific performance.

The error of this is patent; although incidentally a breach of contract, the interference is more serious than that; since respondent, as we have shown, has title, the attempted sale of respondent's property by petitioner is a tort by him as an individual; it amounts to an arbitrary condemnation of the citizens property by a wrong doing officer.

Thus, while only the parties to a contract may be sued for its enforcement, a wrongdoer interfering with property, title to which happened to be obtained by contract, cannot say, even though he be agent for one of the contracting parties, that his principal is a necessary party. For he is committing a wrong independent.

In re *Ayres*, 123 U. S. 443, and *Shubert* v. *Woodward*, 167 Fed. 47, cited by petitioner, stand for this general rule rather than the equation which he claims for it: where the prayer of the bill expressly requests injunction against "*all* breaches" of a contract, it is in effect a bill for specific performance. But In re *Ayres*, as usual in this Court's treatment of sovereign immunity and its limitations, it is careful to distinguish cases where the act threatened, although perhaps a breach of a contract of the United States, is also an unlawful attack, by the

[8] Petitioner's unfounded misapprehension that respondent's prayer calls for any type of *acceptance* much less acceptance from the *United States* is well demonstrated by his footnote #15 at the same page where he quotes from a case which admittedly was a suit "to oblige the United States to *accept* continued performance". (Emphasis supplied.)

officer on "other rights of person and of property". 103 U. S. at 503.

Thus on petitioner's theory, *Land* v. *Dollar* is incorrectly decided; since the wrongful withholding of Dollar's stock was also a breach of the contract of pledge.

In *Shubert* v. *Woodward, supra*, the Court pointed out that, even where specific performance could not be granted, an injunction against invasion of an independent property right—e.g. a patent—could be issued, even though that right happen also to be guaranteed by the unenforceable contract.

> "This, like most general rules, is not without its exceptions, under which injunctions may be lawfully issued to restrain the performance of specific acts in violation of agreements whose specific performance the courts would not completely enforce, as where certain acts violative of an agreement constituted an infringement of complainant's patents" (167 Fed. at 53, 54).

I (A) (2) Beginning at Page 28, Petitioner asserts that this suit is one for specific performance. Nowhere does the Petitioner support the assertion with any argument as to how, why, where and when the prayer of the Complaint seeks specific performance, or even any affirmative relief against the person of the defendant, much less against the *United States*.

Under I A 3, page 29, petitioner's argument is premised upon this same error, inasmuch as he claims to apply the law of a case where affirmative relief was requested against officials of the sovereign; where performance would affect the sovereign's treasury. The sovereign's treasury could in no way be affected in the present suit unless petitioner were allowed to subject it to double liability by being allowed to convert respondent's coal. Needless to say, again there is no affirmative relief prayed for in the present complaint; and the treasury could not be adversely affected by respondent obtaining its coal rather than the ascertainable portion of its damages for the conversion thereof.

The relief requested in the instant cast is fully prohibitive or negative. It does not seek to compel any positive or affirmative action upon the person of the petitioner, much less the United States. At page 30, petitioner as if seeking to reinforce his erroneous argument of "specific performance" by constant repetition, again reiterates his unsupportable claim that this is the relief sought, and that although non-existent, its effect somehow is cast upon the United States because "a declaration was asked that Respondent had good title to its property and that the means by which it acquired title is still valid and in effect." This is answered at p. 33 *et seq. supra.*

Under sub-section 4 of I A, at page 31, petitioner assumes that "Mr. Larson will be required, if Respondent will be ultimately successful, to order his subordinates not to deliver the coal to the Midland Coal Company *but to load it on freight cars at Camp Maxey, Texas, in accordance with respondent's shipping instructions*".

As pointed out, *supra*, the trouble with this argument is that the complaint does not seek this this affirmative relief and does not undertake to compel the action which petitioner erroneously claims is the relief sought.

Even if delivery of the coal were sought, it is well established that mandamus would lie for a merely ministerial act, such as loading coal (or handling of stock certificates such as were involved in *Land* v. *Dollar*, or discontinuing wrongful possession as in *United States* v. *Lee*.) That illegal dealing with the property of citizens by Government officials may be prohibited by negative injunction is too well established by the *Lee-Land* line of authorities to require detailed argument herein. Even positive relief was approved in the *Land* case.

At sub-section 5 of I A, page 33, Petitioner undertakes to state respondent's answering argument for it on the subject of "specific performance". Inasmuch as respondent does not and has not prayed "specific performance" nor even delivery, but only protection of its title, petitioner's lengthy discussion from Page 33 to page 38 on this subject is rendered meaningless, except for its revela-

tion of the false premise upon which petitioner's entire defense is based.

Petitioner represents that this Court decided the case of *Goldberg* v. *Daniels* (231 U. S. 218) "without determining the issue of title".[9]

This is at complete variance with the *only* holding of the case. This court's unanimous opinion stated:

> "We see no sufficient reason for throwing doubt upon this premise for the decision, but there is another that comes earlier in point of logic. The United States is the *owner*, in possession of the vessel." (*Id.* at 221. Emphasis supplied.)

Thus the only ground of decision was title in the United States and while it is difficult to realize that petitioner does not recognize that *ownership* and *title* are synonomous, such seems to be the case.

The underlying errors footnoted at this same page are also worthy of note. Petitioner states that "In view of the detailed pleadings of facts and circumstances the Secretary's allegation of title was a conclusion of law which the plaintiff's demurrer did not admit". (The Secretary of the Navy *answered*, alleging title in the United States.)

For this proposition he cites the *Newport News* and *Nortz* cases distinguished *supra* p. 24; but, as we have there shown, an allegation of title is a well pleaded allegation of ultimate fact, *not* a conclusion of law. Therefore Goldberg's demurrer to the answer did concede title in the United States. This was the only basis for the statement of Justice Holmes: "The United States is the *owner* . . ."

At the very least, this demurrer deprived Goldberg of the benefit of the rule that all doubts shall be resolved in favor of the complaint on motion to dismiss, and gave the benefit of that rule to the Secretary of the Navy's answer.

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[9] Pet. Brief, p. 36.

A quotation from the recent correct application of the *Goldberg* case in *Fulton Iron Works* v. *Larson*,[10] No. 9799, App. D. C., decided Oct. 13, 1948, is in accord.

> "The case which to us seems absolutely controlling on this point is the celebrated case of *United States ex rel. Goldberg* v. *Daniels*.
>
> That was a case in which there had been survey, condemnation and appraisal of the old U. S. Cruiser Boston and the cruiser was stricken from the Naval Register by authority of law. Thereafter the Navy advertised for proposals of purchase. Goldberg bid more than the appraised amount sending a certified check for the whole sum bid. On the opening of the bids, Goldberg's bid was highest. Secretary Daniels, having in the meantime decided to accede to the request of the State of Oregon to loan the old cruiser to that State as a training vessel, refused to deliver the vessel and returned the check to Goldberg. Goldberg petitioned for mandamus to compel the Secretary of the Navy to deliver the vessel to him. Daniels in his answer admitted all the facts as stated but set up that the bid is not an acceptance of an offer but is itself only an offer, subject to be accepted or not at the discretion of the Secretary of the Navy, who never accepted Goldberg's bid, the Government meantime having decided to lend the cruiser to the State of Oregon. Goldberg demurred but this court dismissed the petition on the ground that the discretion of the Secretary was not ended by the receipt and opening of the bids even though they satisfied all the conditions prescribed. 37 App. D. C. 282 *sub. nom. United States* v. *Meyer*.
>
> On appeal to the Supreme Court, Mr. Justice Holmes speaking for the Court in one of those succinct opinions for which he is so justly famous said: "We see no sufficient reason for throwing doubt upon this premise for the decision, but there is another that comes earlier in point of logic. The United States is the *owner* in possession of the vessel. It cannot be interfered with behind its back and, as it cannot be made

[10] This was the same bench which unanimously decided the instant case below.

a party, this suit must fail [citing cases]." (Emphasis supplied.)

Thus, both the complaint *and answer* are entitled to equal weight. Taken together, they unmistakably showed a mere *offer* to buy the Boston, and therefore no title in Goldberg, but rather in the United States.

Justice Holmes, therefore, correctly ruled that the United States is the *owner* and that there is no need to bother about discretion, as no contract of sale existed; only the offer to make one.

Here, the situation is radically different. The complaint, *standing undenied*, alleges title[11] in the citizen, and must be taken as true. Moreover, a contract of sale, not a mere offer, is shown by the Exhibits. Petitioner's objection that the complaint sets out much of the basis of the allegation applied with equal force to the *Lee-Land* authorities.

I (B). *The Lee-Land Authorities Control Herein.*

Under I B, Petitioner has adopted the device of setting up five novel qualifications of the Lee-Land line of authorities, which he then proceeds to demolish as applied to the instant case. The line includes:

> *Cunningham* v. *Macon & B. R. Co.*, 109 U. S. 446, 452, 27 L. ed. 992, 994, 3 S. Ct. 292, 609; *Tindal* v. *Wesley*, 167 U. S. 204, 42 L. ed. 137, 17 S. Ct. 770; *Smith* v. *Reeves*, 178 U. S. 436, 439, 44 L. ed. 1140, 1142, S. Ct. 919; *Scranton* v. *Wheeler*, 179 U. S. 141, 152, 153, 45 L. ed. 126, 133, 134, 21 S. Ct. 48; *Philadelphia Co.* v. *Stimson*, 223 U. S. 619, 620, 56 L. ed. 576, 577, 32 S. Ct. 340; *Goltra* v. *Weeks*, 271 U. S. 536, 545, 70 L. ed. 1074, 1079, 46 S. Ct. 613; *Ickes* v. *Fox*, 300 U. S. 82, 96, 81 L. ed. 525, 530, 57 S. Ct. 412; *Great Northern L. Ins. Co.* v. *Read*, 322 U. S. 47, 50, 51, 88 L. ed. 1121, 1123, 1124, 64 S. Ct. 873.

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[11] Title is a well-pleaded answering allegation to show rejection of an offer.

Not only is the instant case within the broad doctrine of property, tort, and contract, enunciated by the *Lee-Land* line but it is also within the much narrower rule of the sovereign disposal authorities treated at p. 33, *supra;* which fully elucidate the property and trust apsects of governmental sales and disposals.

Under I B 1, page 30, he cites the *Land* case as prohibiting specific performance and quotes therefrom the distinguishing language of an "attempt to get specific performance of a contract to deliver property of the United States (330 U. S. 737). As pointed out *supra,* the difficulty with this argument here is, of course, that the United States does not own the property involved; and specific performance is not requested.

Under I B 2, his second proposition is that Respondent has not made a substantial claim that Petitioner is seeking to act in excess of his statutory authority. As pointed out, *supra,* this is a conclusion of law which could not be well pleaded, and the complaint in paragraphs 5, 12 and 14 (R. pp. 2, 6, 7) alleges facts requiring this legal conclusion.

At page 43, petitioner reveals the rationale of his entire philosophy of the law with respect to this case. After a recital of the statutory law authorizing the petitioner to dispose of public property, he acknowledges that his concept of his authority is that it is so *broad* in scope and all-inclusive in nature that he has a legal right to *misconstrue* contracts on behalf of the United States for which only it is liable. He says, on page 43, in referring to his authority "This plenary grant of power indicates that the Administrator's official authority with respect to disposal contracts was not limited to a correct interpretation of the contractual terms; even when he *erroneously construes* a particular agreement and order his subordinates to withhold surplus property in accordance with *that interpretation,* he acts within the scope of his *lawful* authority as War Assets Administrator". And further, "the refusal

to deliver the coal was thus an *authorized act* although it may have resulted in a breach by the United States . . ." Thus petitioner pegs his entire concept of his authority on the theory that he is privileged to misconstrue the law of property and sales and recapture title at his whim—i.e., to condemn any property he has once transferred. Whether he has a "right" to misconstrue ordinary contracts is not here in issue; the point is that a right to misconstrue a contract of sale or any other document passing title is a right to confiscate the property of the citizen. This Congress could no more have intended than that its laws for disposal of public land by patent could be reversed by its officers after performance or tender by the patentee. Cf. *Lane* v. *Hoglund, supra*, and related cases at p. 33 *et seq.*

Petitioner thus urges that the unlawful act of misconstruction is made lawful; or viewed from the standpoint of authority, that the Administrator has authority to exceed his authority.

On the same point the petitioner argues that he has exactly the same authority as the president of a mail order house who is "authorized" to misinterpret a contract by his principal. This is an exercise in fallacious semantics: because the mail order house cannot lawfully *authorize* a tort or breach of contract. Petitioner's phrase comes from its *vicarious* liability; to hold the corporation so liable, courts say that the particular unlawful act of the agent of the corporation, although *unauthorized*, was within the *scope* of his general authority. So in *Land* v. *Dollar*, the loan to Dollar was within the scope of Maritime Commission general authority; but that did not cloak with authority, or immunity, the Commissioner's wrongful act in illegally withholding stock owned by the citizen Dollar; even though that, too, was within the general scope of their authority in some fact situations; but unauthorized in the individual instance because illegal.

Another difficulty with petitioner's point is that the United States of course has not authorized the tort of con-

version. Although petitioner is silent on that aspect, it may fairly be deduced that he also urges authority for the tort of conversion by the same verbal fallacy. The contrary rule not only applies to liability where the tort has already been committed, but, even more clearly, to the prohibition of the commission of a threatened future tort. Petitioner then indirectly attempts to make a third point by implying that both the United States and the mail order house would be exclusively liable for any such wrongful act; that the officers or agents, therefore act with personal impunity for their part in the wrong. This, of course, overlooks that the wrong-doing actor can never escape the legal responsibility for either tort or crime merely because a principal is also vicariously liable.

It is most difficult to see how petitioner hopes to draw comfort from the case of *Wells* v. *Roper* which he argues and quotes[12] on his erroneous proposition "that a government official misconstruing a government contract does not thereby normally exceed his powers".

This case involved an attempt to force the United States to continue accepting the performance of services under its contract. As petitioner concedes the Court pointed out that "the effect of the injunction asked for would have been to oblige the United States to accept continued performance" (246 U. S. at 337). Thus this court applied for the benefit of the United States the equivalent of the general hornbook rule of contract and agency, that no master or principal is obliged to accept the services of an agent or employee. This is because damage for breach is an adequate remedy; and because the policy of forcing acceptance of services, and therefore, possible vicarious liability, upon an unwilling party is abhorrent.

That the sole ground for its decision was the character of the authority validly exercised by the government officer, is made crystal clear by this court's express holding "that the duty of the Postmaster General, and of the defendant

[12] At. pp. 44-45 Pet. Brief.

as his deputy, was executive in character, not ministerial, and required an exercise of official discretion" (*Id.* 338).

The question of breach *vel non* (or "misconstruction of the contract" as petitioner prefers to call it) had utterly nothing to do with the above sole point of decision, as the italicized portion of petitioner's quotation from the case (p. 45, Pet. Br.) plainly shows: "And *neither* the question of official authority *nor* that of official discretion *is affected* for present purposes, by assuming or conceding, for the purposes of argument, that the proposed action may have been unwarranted by the terms of the contract and such as to constitute an actionable breach" (246 U. S. at 338).

Thus the "misconstruction" had no relation whatever to the *only* point of decision which depended entirely upon the executive character of the officer's act, and the case could not possibly stand for petitioner's proposition that normally unlawful misconstruction is a part of lawful executive discretion.

Carrying the mail can be done only as agent for the sovereign; and the sovereign, *like any other principal*, has lawful discretion to dismiss agents, being liable only in damages for breach of a contract to retain the agent. Thus Roper as an officer of any ordinary corporation would have the same immunity from injunction. This is a far cry from a supposed discretion arbitrarily and illegally to condemn property of a citizen by "misconstruing" petitioner's contract which gave the citizen title. If so, why were not the officers involved in the *Lee* case entitled to "misconstrue" themselves into title, by misreading their tax deed?

Petitioner, in addition to claiming the necessity of allegations of force and violence[13] in the complaint undertakes reiteration of his previous argument that a conclusion of law must be alleged as fact in a complaint. This time he argues that the affirmative conclusion of law as to whether or not certain acts amount to a tort must be contained in

[13] At p. 46, Petitioner's Brief.

a complaint. Obviously the complaint alleges facts amounting to a tort. The legal conclusion that the tort of conversion is about to be committed is supported by these allegations of fact. The complaint fully specifies the request for relief from *further* wrongful acts by petitioner.

Petitioner then denies[14] that there has been personal misconduct on the part of either the petitioner or his predecessor in office. That there was, is a fact which can be fully shown and established at trial. It has been alleged that they were acting illegally in purporting to sell respondent's property (as revealed in the quotation in Petitioner's Brief, page 47, footnote 30). Their threatened action could only amount to the commission of the tort of conversion. Their personal knowledge of the affair is of course a part of their illegal actions with respect to respondent's coal. This not only can be fully established at trial but personal participation is already plainly shown: first, by an affidavit supporting his subordinate's actions which petitioner Larson made in the Court of Appeals when the cause was pending there against Littlejohn, and second, by petitioner Larson's substitution of himself in this cause on his own voluntary motion in this Court. By his substitution he affirmed Littlejohn's previous and threatened wrong (in which as a matter of fact he had participated).

Having asserted a supposed personal innocence on the part of the petitioner and his predecessor, petitioner then urges the innocence of his subordinates upon the ground they were acting on his orders. But he cannot have it both ways. If a wrong is being done, either he approves it or his subordinates, who act officially only in his name, are acting as private individuals, in continuing it contrary to his wishes.

Actually both horns of this dilemma are of academic interest only, since the wrong of withholding the respondent's property is a continuing one and the proposed con-

[14] Petitioner's Brief, p. 47.

version has not yet occurred. Petitioner can stop one and prevent the other. The cases which he cites[15] are applicable solely to non-liability of public officers in damages *for torts already completed* by their subordinates without approval.

It is urged that failure to deliver where one has no power to deliver may be a breach of contract but not conversion. But petitioner or his subordinates can voluntarily order delivery at any time, though this is not sought in the prayer of this complaint.

Petitioner undertakes to absolve himself from the wrong of his predecessor.[16] As Petitioner must well know, he had a number of conferences with officers and counsel of respondent long prior to the institution of suit. Petitioner's close personal knowledge of this transaction can be fully established at trial.

The present petitioner, Larson, makes the assertion at page 49 of his brief that he "does not stand in the shoes" of his predecessor. This is an astonishing contention. He has plainly, by his own voluntary motion, substituted himself in this Court as a party to this litigation for his predecessor, the former petitioner Littlejohn, so that actually not only does he stand in the "same shoes" as Littlejohn, but he has voluntarily of his own motion climbed into those very "same shoes" thereby renewing and affirming his predecessor's continuing wrongful act and his own previous participation in it.

At pages 50 and 51 of Petitioner's Brief it again becomes necessary to point out that the relief sought request no affirmative action and that even mandamus to hand over the coal would require a ministerial act just like handing over stock certificates in the *Land* case.

At page 51, petitioner asserts that "here the complainant demands something more than withdrawal from his property and seeks to compel continuing affirmative action by a

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[15] Footnote 31, Petitioner's Brief.

[16] Page 49, Petitioner's Brief.

government agency." Again it must be pointed out that the complaint seeks no affirmative relief of any kind, nature or description and the petitioner is required to do nothing except refrain from committing the illegal acts which he threatens. Respondent itself can load the coal if necessary, or once it is determined that petitioner cannot convert respondent's property, petitioner might voluntarily load it.

Petitioner seeks to create one rule for a citizen's long-held property and another for newly acquired property.[17] He urges that respondent in the instant case must have owned his property for a very long time; that respondent's property must never have been owned by the government at any time. (By inference he later argues that *legal* title derived from a contract of sale is necessary and denies the sufficiency of equitable title derived from a contract to sell unique property). Under this theory the United States could wrongfully withhold possession or illegally claim by seizure on any property once owned by the United States. Thus, any purchaser of any part of the one-fourth of the land of this country, once owned by the United States, or of the billions of dollars of surplus personal property which has been sold, could never have a good title. Petitioner would to this extent unsettle vested property rights that have stood for hundreds of years and are valued into hundreds of billions of dollars. The sovereign disposal cases (pp. 33-38, *supra*) completely demolish petitioner's argument on this.

Petitioner concedes[18] that a citizen's property "improperly held from the claimant by a government officer" may require "an opportunity to recover" it. This concession is most valuable in connection with an admission which he makes at the top of the next page (55) where, in the course of denying that such rule applies to the instant case, he admits that the coal in question was *sold* to respondent. He says that such opportunity of relief should be denied to cases of "government surplus property sold by the gov-

[17] Sec. 4, B-I, page 51, Petitioner's brief.
[18] Page 54, Pet. Brief.

ernment but undelivered for reasons *deemed adequate* by the surplus property officer." This reveals the sweeping nature of petitioner's claimed privilege to ignore the law of property. In essence, it is that, even though the government has validly sold and finally disposed of property to a citizen, petitioner yet retains, by reason of mere possession, the sovereign right to deny an opportunity to the citizen to obtain his property for any reason, however arbitrary, provided only petitioner "*deems it adequate*".

Petitioner then devotes argument to the proposition that the rights of the sovereign United States are somehow affected by the relief prayed in the instant case.[19] This overlooks the significant admission of fact and underscores the deficiency of petitioner's legal proposition. He concedes that the *Lee-Land* line of authorities were controlled by the fact that they affected possession only and that the property interests of the United States could in no way be bound or affected by the judgments therein. Just as in the *Land* case, so here, proof that the citizen has title to the property, possessed by government officials, is sufficient to show absence of effect on the United States. In the instant case the United States has neither answered nor appeared to assert title, nor has the petitioner personally answered to alleged title in the United States. Respondent's prayer only asked an injunction against the petitioner to prevent him personally from attempting to sell its property.

Petitioner cites the law of and argues the facts[20] of *Mine Safety Appliances Company* v. *Forrestal*, 326 U. S. 371, and quotes from pages 374-375 thereof. The quoted portions of this case[21] plainly show that it was an attempt on the part of the citizen to force the U. S. to "relinquish *ownership*" of the money in question. The decree must necessarily take money out of the Treasury in payment of a supposed debt. The citizen could not possibly have title to any particular part of the Treasury balance.

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[19] Page 55, Sec. 5, Pet. Brief.

[20] Footnote 39, page 56, Pet. Brief.

[21] Page 57, line 5, Pet. Brief.

Petitioner attempts a summary of his fallacious and unpremised points[22] under the five preceding subsections of I B. In summary *in seriatim*, the following answer is made:

1. The complaint neither prayed (a) specific performance of respondent's contract nor (b) did it mandamus the purely ministerial act of shoveling coal, nor (c) did it request positive action of any kind, nature or description on the part of either petitioner or his subordinates. An action in equity cannot possibly be one for specific performance unless prayed in the complaint.

2. The complaint makes "a short and plain statement of facts" from which the legal conclusion that petitioner purported to exceed his authority and was about to commit an excess thereof must be drawn.

3. (a) The complaint alleged facts from which the legal conclusion that a tort was about to be committed must of necessity be drawn.

(b) The relief requires no affirmative act of defendant either in his official or unofficial capacity.

4. (a) Title not only means substantial but also real and complete ownership either equitable or legal which knows no dilution of quality.

(b) Length of ownership or prior ownership do not affect the rights of a citizen owner. Large portions of both the law of property and of torts and of crimes are entirely dependent upon the meaning and incidence of property ownership. (See pp. 33 to 38 *supra*)

5. In seeking to restrain the unauthorized acts of petitioner with respect to the coal in question, it is necessary for respondent to show that its lawful prpperty rights are being invaded and it is therefore necessary to show that it owns the coal in question (which it does in fact; and in any event on the present status of the pleadings) and that it has lawfully acquired title thereto. Just as in the *Lee-*

[22] Pages 57, 58, Pet. Brief.

Land and sovereign disposal lines of authorities, there is here necessary a declaration that the citizen has title which renders the proposed action of petitioner Larson completely illegal and unauthorized under law.

C-3. *The United States has not claimed and cannot lawfully claim title to respondent's property.*

Under C of I, at page 59, petitioner again reiterates his fallacious and unsupported claim that "this suit compels specific performance of a government contract concerning the sale of government-owned coal". It is thus again necessary to point out the prayer for relief seeks no affirmative act of any kind, nature or description from petitioner or his subordinates and much less does it seek specific performance of a sale contract already performed by the United States.

Petitioner then assumes that "the subject of the contract (coal) is property *which the United States claims* as its own." Thus petitioner makes it necessary to reiterate that the United States neither has property interest in the matter nor has become a party to this suit, *nor has petitioner answered by way of defense alleging title in any third party, including the United States.*

At page 59 under sub-point 1 of C-1, petitioner concedes that cases within the *Lee-Land* rule are "*perhaps*" excepted from the rule of sovereign immunity. But he would apply immunity to any "suit directly involving the use, *possession*, or title of property in which the government claims an interest." His rule does not fit the facts for the instant and *Lee-Land* cases, inasmuch as this is not a suit in which the government "*claims*" *title by answer* (it is presumed). *Possession* is necessarily involved in all of the *Lee-Land* line. In any event, his concession of an exception for the *Lee-Land* line of authorities must of necessity include an exception for the instant case to the broad rule which he has erroneously stated in his own terms. In fact, the instant case is much stronger than the *Land* case, as there can be

no question here of respondent's either legal or equitable title to its coal, either within or *aliunde* the pleadings. In the *Land* case record legal title was concededly in the United States and the Dollar interests prevailed solely on a claim of equitable title. Also affirmative action was *required* by government thereunder while no such relief has been sought here.

Petitioner then undertakes[23] to support his proposition by citation and argument of *Louisiana* v. *Garfield*, 211 U. S. 70. At page 61 of his brief, petitioner erroneously states that "Justice Holmes briefly reviewed the States' arguments that it had good title to the land, stated that at least the case was doubtful, and concluded: 'But that doubt cannot be resolved in this case. It raises questions of law and of fact upon which the United States would have to be heard.'"

However, the court did not dispose of the allegation of title on the quotation supplied by petitioner. The Court first determined that Louisiana's record title contained a fatal flaw *upon the pleadings and the relevant land statutes*.

> "The approval proceeded upon a manifest mistake of law; that upon the abandonment of the military reservation the land fell within the terms of the grant of 1849. *Therefore it was void upon its face.*" (*Id* at 77—italics supplied.)

Petitioner's quotation relates solely to another question, namely, the doubtful ability of the United States to deny its void "swamplands" grant after the lapse of a five years statutory limitation period.

Petitioner correctly admits at page 61 that "Mr. Justice Holmes, for the Court, first assumed 'for purposes of decision that if the United States clearly *had no title* to the land in controversy we should *have jurisdiction* to entertain this suit'." (211 U. S. at 75.) (Italics supplied.)

Thus petitioner's quotation related solely to a statute making void patents conclusive upon the United States. It

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[23] Pet. Brief, pages 60 and 61.

did not relate in any way to the allegation of title under grant by the plaintiff Louisiana but only to the doubtful question whether possession under a void swamplands grant after five years might have conferred rights *additional* to the claim of title by grant (void as a plain matter of law) which Louisiana stated in its complaint. Upon this *separate* question the United States would have to be heard because the proof would be directed to showing absence of possession *by the United States* during the entire period.

Thus petitioner's proposition that the case lays down a rule broad enough that a citizen's complaint alleging title by grant, patent, or bill of sale is to be dismissed for want of jurisdiction without answer, trial or inquiry is incorrect. See pp. 33-38, *supra*.

The case of *Stanley* v. *Schwalby*, 162 U. S. 255, is one from which it is difficult to see how petitioner can derive comfort.[24] On the contrary it clearly delineates a sound limitation of the *Lee-Land* line of cases, not applicable in the present situation, but which affords adequate protection to the interests of the United States. In that case, *Schwalby* brought suit in State court in Texas under a State statute permitting an action of trespass to *try title*. The result was binding not only against the parties but upon all persons claiming from, *through*, or under such party. The plaintiff Schwalby, by a deed unrecorded for fifteen years, claimed a one-third undivided interest in a military reservation. The officers *filed an answer*, setting up title in the United States as a justification.

This Court ruled, as a matter of law, that title to the whole of the land was in the United States and gave judgment accordingly:

> "The inevitable conclusion, as matter of law, is that the United States acquired a good and valid title, as innocent purchasers, for valuable consideration and without notice of a previous conveyance to McMillan." (McMillan was the source of plaintiff's title.)

[24] See Pet. Brief, p. 61 *et seq.*

It may be noted, moreover, that a proper following of the "answer" procedure used by the United States in *Stanley* v. *Schwalby* would, wherever the United States has a substantial claim of title to the property claimed by the citizen, afford a perfect method of preventing the "disastrous" consequences suggested by the petitioner. But it is a long way from the sound rule of *Stanley* v. *Schwalby* to the sweeping view of the doctrine of sovereign immunity taken by petitioner in this case. In this connection, this Court there expressly reaffirmed the doctrine of *United States* v. *Lee* in the following language:

> "The validity of the authority exercised by the defendants as officers of the United States depends, according to the decision in *United States* v. *Lee*, before cited, upon the question whether the United States had or had not a good title in the land." (*Id.* at 278.)

This quotation disposes of petitioner's contention that an officer of the United States can have authority to exceed his authority by "misconstruing" documents of title.

I D *The decree sought could neither affect the public domain nor interfere in the lawful public administration.*

Petitioner[25] (apparently under the impression that it helps establish his proposition that a decree in this case would somehow expend itself on the public domain) launches into a general attack on this court's authoritative decisions under the sovereign immunity doctrine and characterizes them as a "murky zone". That these authorities clearly delineate the distinctions between illegal dealings by public officers *with the property of citizens*, and the protection of valid executive and discretionary functions is unquestionable, although on other points all the authorities cannot be reconciled. Persistent attempts to cloak officers' wrongful acts by misapplication of the doctrine of immunity has never been sanctioned by this Court.

[25] I D, Page 63, Pet. Brief.

Drawing together alleged "governmental considerations" which petitioner claims have been threading his argument, petitioner offers criticism[26] of jurists and lawyers who recognize the proper application of the rule by claiming that sovereign immunity "does not stand high in their estimation". Such is not the case. Sovereign immunity in its proper sphere is a very necessary doctrine. This is undoubtedly generally recognized by the bench[27] and bar alike. That the doctrine cannot be extended to a point of sanctioning an overturn of the fundamental rules of property and tort which have stood for hundreds and even thousands of years is likewise generally recognized by bench and bar alike, except for that small segment of the latter which has persisted for many years in attempting to extend the doctrine to fields where it has no place. This small segment has succeeded only in erecting a line of authoritative monuments to their intransigence such as the *Lee-Land* line of cases which set forth in unmistakable terms the folly of attempting to cloak unauthorized wrongful and tortious acts of public officers in the majestic mantle of sovereign immunity.

The rest of petitioner's argument under subsection 1 on pages 64, 65 and 66 is devoted to the fact that respondent voluntarily entered into the contract. For that matter, the sovereign United States directly invited Domestic and Foreign to bid—which in no way relates to an expenditure of the decree in this case upon the public domain. Petitioner also comments that at the time respondent purchased its property it was "fully aware of the status of its opposite number". The same reasoning applies to petitioner. He knew the status of his opposite number and the Lee-Land rule, all of which is immaterial to the expenditure of this decree upon the public domain.

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[26] I D 1., Page 64, Pet. Brief.

[27] Cf. *Fulton Iron Works* v. *Larson*, No. 9799 App. D. C., Oct. 13, 1948 (Citizen's *offer*, rejected even by "skulduggery", gives no standing to enjoin a wrongdoing officer.

Petitioner casually disposes of respondent's ownership[28] under the rules of property and sales and characterizes them as "technical title" and "formal property interest". Title and ownership are not technical, though they may depend on technical rules—they either exist or they do not and if they do they carry with them all the rights and incidents of ownership. It is impossible to see how this type of argument requires the decree in this case to expand itself on the public domain.

From a practical standpoint, it is difficult to see how the United States will be aided, in the disposal of bulky surplus property, if purchasers can have no certainty of title until actual delivery. As pioneer purchasers of surplus coal, respondent knows the great expense and extensive arrangements involved before shipping instructions can be given. Railroad rates must be established, an ultimate buyer found, export licenses obtained, railroad cars ordered in, and a hundred other arrangements completed. Incidentally, it may have been due to fear of conduct such as actually occurred that, when respondent bought the first surplus coal in 1946, the highest bid the United States had received was a few cents a ton.

Petitioner argues[29] the "practical ends" of the immunity doctrine and claims that "coal forming part of the United States' surplus stores and in its custody, would be *abruptly transferred* out of its hands by court order, and government officials would be required to *load* and *deliver* the coal to respondent's order". Again it must be pointed out that no affirmative relief whatever is requested by respondent in its complaint. This quotation is another example of the fanciful claims which petitioner seeks to engraft on to respondent's prayer for relief in the instant case. The coal is no longer surplus. Title was long ago transferred out of its hands, and no such transfer is sought here.

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[28] Page 66, Pet. Brief.

[29] I D, subsection 2, page 66, Pet. Brief.

Petitioner next complains that an appeal was taken in this case from the District Court's dismissal of the complaint, fifty days before the day petitioner would be required to answer under the Federal Rules of Civil Procedure. He apparently is attempting to criticize respondent for this and the fact that he was deprived of the "relatively lengthy periods (which) are established in order that the necessary reports be made and the government's law officers may familiarize themselves with the facts before answering".[30]

It is entirely petitioner's own fault that he did not answer. It was he who filed the Motion to Dismiss and voluminous affidavits five minutes before hearing. This necessitated the appeal from the District Court's hasty decision.[31] Apparently the gist of petitioner's argument that the decree in the instant case would expend itself upon the public domain consists in the inevitable fact that any property owner, seeking to protect his property from unlawful interference by a governmental officer, will cause such officers some time and effort in the Courts. But, of course, officers are acting neither for the public domain nor in the public interest when they seek to commit illegal acts with respect to a citizen's property.

I.E. *No Mandamus has been sought and even if it had been it would lie for the purely ministerial act of loading coal or withdrawing illegal possession.*

Petitioner seems to claim both that mandamus has been requested in this case and that affirmative action is requested in some form.[32] Such is not the case as pointed out numerous times before; but respondent repeats that even if mandatory relief had been requested to the extent

[30] Pet. Brief, page 69.

[31] "The summary nature of the hearing preceding dismissal precluded the careful consideration to which appellant was entitled." R. page 58.

[32] I. E. page 70, Pet. Brief.

of requesting the loading of respondent's coal, by its nature this would be purely ministerial. Petitioner, however, concedes that mandamus would be proper even if requested "if respondent were to show that petitioner and his predecessor had no discretion to construe the contract as they did." Petitioner then again reiterates his claim that he has authority to enlarge his own authority to include condemnation by misconstruing the contract and in effect to act as a Court of last resort on the property interests of citizens. Thus petitioner, unless he can establish his absurd proposition that he has authority to exceed his authority (by misconstruing a contract) has conceded that loading the coal would be mandamusable if it had been prayed in the complaint.

Petitioner cites *Brashear* v. *Mason*, 6 How. 92 and quotes therefrom.[33] His own quotation clearly reveals that the citizen there sought to compel affirmative action from a public officer and at the same time collect a debt from the public treasury.[34] Needless to say the complaint in the instant case seeks no affirmative relief against either the United States or the petitioner personally nor does it attempt to enforce a debt and compel payment of *money* from the public *treasury*.

II. District Court Had Equitable Jurisdiction to Enforce Conversion of Respondent's Coal.

A. Tucker Act gives neither a plain, adequate, remedy for irreparable damage nor protection from future tort.

Petitioner seeks to contradict the plain allegations of the complaint[35] although he has neither answered nor can he answer under the facts which respondent is prepared to

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[33] Page 72, Pet. Brief.

[34] The quoted portion of the opinion establishes that the Court was laying down a rule to deny mandamus where such "would show the title of the relator to his *pay*, the amount, and whether there were any monies in the *treasury*". (Emphasis supplied.)

[35] II A. page 73, Pet. Brief.

prove at trial. He seeks to introduce hearsay to establish that the coal in question is non-unique. He argues that the jurisdiction of equity is solely dependent upon its invocation in the Fourteenth Paragraph of respondent's complaint. Obviously, the complaint contains other allegations of fact upon which the Court is justified in passing its jurisdictional conclusion of law as to the propriety of equitable relief under the facts alleged. The complaint in paragraph 4 (R. page 2) alleges, as petitioner concedes in a footnote:

> "Upon entering into these contracts the plaintiff applied for special railroad rates to Texas ports which were granted and for special export licenses outside the regular export allocation system of the U. S. Government for newly mined coal, which were granted."

Petitioner asserts this referred only to the prior contract. *But this contract was made part of the prior contract.* The accepted offer (Exhibit B, R. p. 12) stated "on same terms and conditions *and made a continuing part of our recent contract* at the same price". (emphasis supplied)

Therefore, the Court of Appeals was fully justified in basing its jurisdictional finding upon the unique character of the coal thus alleged.

In addition to the unique character of the coal which is the first ground of equitable jurisdiction, the respondent has the following independently sufficient grounds for equitable jurisdiction in the instant case. They are: second, the loss of trade, trade standing, reputation, and good will; third, multiplicity of suits; fourth, the impossibility of measuring a portion of the damage.

Petitioner also undertakes,[36] to plead as fact in his brief that which he imagines respondent could have done, claiming that all damage could have been avoided by outside purchasing of coal. This could not be done because (1) non-surplus coal would not satisfy the purchaser, who

[36] Page 73, Pet. Brief.

expected special licensing; and (2) respondent would have been required to assume the risk of purchasing coal at a higher price and thereby risk the uncertainty of a law suit in the Court of Claims to recover it. Yet Petitioner would deny respondent's right of opportunity to prove this at trial.

Petitioner also asserts that respondent's "loss of profits as well as its potential liability to its repurchasers could be adequately calculated from the stated terms of the resale to Penn-Pocahontas and the further resale to the Portuguese Government." (Pet. Brief page 76-77.) This is untrue. The loss of reputation due to failure to deliver is not calculable with certainty, even if some of the money damages for the failure were. Moreover, the loss to Portugal by receiving less coal net (due to licensing restrictions) than it had a right to expect would be most difficult to calculate. If an important power plant had to shut down, who can calculate all of the consequential damage?

Petitioner undertakes to plead new "facts" by way of answer in his brief (page 75) as to the uniqueness of the coal. This he does on the hearsay of some anonymous employee of the "*Office of International Trade*", purporting to represent to this court that there was no exception ever made for surplus coal in granting export licenses. This is utterly false and erroneous. Respondent can show conclusively at trial the difficulty to which it was put in obtaining export licenses for contracts for previous shipments of similar coal. It can also prove conclusively that the success of high-level negotiations undertaken for special export licenses for the earlier coal, *with the Office of War Mobilization and Reconversion*, depended greatly upon the surplus nature of the coal.

B. Court of Appeals was correct in finding the export charter of the coal to be unique on the pleadings before it.

Petitioner attacks the Court of Appeals[37] for holding "the peculiar nature of the coal involved soundly bases appellant's (respondent's) resort to equity for relief" and Petitioner argues that this "acknowledges fully all of respondent's contentions to this fact". This finding was, of course, upon the basis of the allegations of the complaint which had to be taken as true on a motion to dismiss. The court was compelled to find all facts as alleged in the complaint. This in no way deprives petitioner of a trial of the fact of uniqueness of the coal, or any other fact alleged in the complaint, at trial. It is to be noted that petitioner in the same section of his brief urges he was entitled to a trial of the merits on the facts, and at the same time argues that respondent should be denied a trial of the facts on the very same question; all of which has been brought about by petitioner's own conduct and voluntary motion to dismiss the complaint before trial. The Court of Appeals could not deprive him of a trial on any fact where they had expressly remanded the case for further proceedings upon reversal of an order dismissing the complaint as they did here.

III. Petitioner Has No Defense on the Merits.

Under Point III petitioner undertakes to show that his defense on the merits is "not frivolous or merely colorable".

In order to assert that his claim of breach has substance, petitioner must rely on a very strained interpretation of clear language in the contract. Frivolous as we believe this interpretation to be, even were the contract a novel one, because of the clarity of the language, its frivolity becomes doubly apparent in view of the contrary interpretation adopted by both parties under the earlier contract.

[37] II B, page 78, Pet. Brief.

In the instant case this very same language, by virtue of the construction and practice adopted under the previous identical contracts has already been interpreted, executed, and acted upon by both petitioner and respondent exactly contrary to the way petitioner now wishes to "misconstrue" that very same language.

It strains credulity to see petitioner now claim that his contention has "substance" when he is expressly bound by the opposite construction which he has already given that very same language. (See p. 69, *infra*, for detailed argument of this point.) This is also an attempt to reverse the "burden of proof". Of course, on motion to dismiss, the complaint must be taken in its most favorable light to plaintiff, not to defendant-petitioner.

Land v. *Dollar*, *supra*; *Tahir Erk* v. *Glenn L. Martin Co.*, *supra*.

Moreover, the Supreme Court is scarcely the forum for the introduction of his factual defenses, if any.

A. Respondent did not breach the contract.

At the outset, it should be noted that breach, as an affirmative defense should have been asserted by answer; and is available on motion to dismiss only if unmistakably revealed by the complaint. But no breach exists, in any event, unless petitioner can now place a new term in the contract which never existed. He previously claimed that the contract contained an express term requiring respondent "to make *a single* cash payment". (Pet. for Cert. p. 16—Emphasis supplied.) He has now abandoned his position that there was such a term in the contract for an attempt to read it into the contract by interpretation. He now states at page 81 of his brief: "We think it plain from this recital (of various contractual provisions) that the parties' agreement was that respondent would deposit the full $17,500 in cash in the Dallas Bank *before* any of the coal was *shipped*." This, however, brushes aside the plain meaning of the recital of contract provisions to which he refers.

From the provisions which he quotes at page 80, there can be no doubt that the provision "contract shall be on cash basis based on railroad scale weights as *heretofore* and *payment* made *upon presentation of your invoices* to same bank in Dallas" was plainly accepted by petitioner. The petitioner admits he replied to respondent that "*your terms* (Respondent's terms) of placing $17,500 with the First National Bank Dallas, Texas, *for payment upon presentation*" were accepted.

Thus, the terms of placing the money were in point of time aimed only at covering payment *when and only when the weight tickets were presented for payment*, and such weight tickets and invoices could not even be in existence until *after* shipment. It is clear Respondent's only obligation was to have sufficient cash in the hands of the Dallas Bank to cover whenever and whatever invoices and weight tickets were presented by the petitioner as each individual car of coal was loaded and shipped, not only from this contract but also (and this petitioner cannot deny) from his experience under previous contracts (of which the instant was expressly made a part). It is thus manifest there was no obligation that the *full* $17,500 be placed in the Dallas Bank *before* shipment inasmuch as *payment* was required only *after* shipment.

The Court of Appeals, after careful scrutiny of the facts alleged, drew attention in its opinion to the fact that petitioner had accepted "*your* (respondent's) *terms* of placing $17,500 with the First National Bank, Dallas, Texas, for *payment on presentation of our* (petitioner's) *invoices*". (Court of Appeal's Opinion at p. 71 *infra*).

In his argument at pages 80 and 81, petitioner quotes several of the printed form provisions of the contract in an effort to prove that no credit had been provided in the instant case. However, each of the provisions which he stresses are rendered inoperative here by their own preface "*unless* credit is provided for in the sales memorandum". There could be no plainer method of providing credit than that provided on the face of this sales memorandum under

the provision labeled "Terms"—"Cash on presentation of weight tickets *as shipped*." This is as much a credit term as "cash thirty days". The weight tickets could not possibly be prepared or presented until after the coal had been loaded, weighed and shipped, which fact petitioner well knew by virtue of the previous contracts of which this was expressly made a continuing part as indicated above. Under the previous contracts respondent can prove that weight tickets couldn't be presented for payment for sixty and ninety days after it had possession of the coal.

Petitioner then fills up pages 81, 82, 83, 84, 85 and part of 86 of his brief with a useless recital of correspondence between respondent petitioner and various banks with respect to placing the $17,500 in the Dallas Bank before shipment despite the fact that respondent was not required to do so by its contract. The only thing this recital serves to show is that respondent's officers and counsel made repeated but futile attempts to comply with the constantly changing whim and caprice of petitioner in a vain attempt to obtain release of its property, not knowing that petitioner had decided to seek an "out" to its contract and would later be somehow persuaded to attempt a conversion of its property to a most persuasive third party.

B. Respondent has title to the coal, contrary to petitioner's assertion.

Petitioner's material on supposed non-passage of title; (Pt. 87-94, Pet. Brief) has been fully answered *supra* pp. 21 to 38.

CONCLUSION.

Wherefore it is respectfully submitted that the unanimous decision of the United States Court of Apepals for the District of Columbia Circuit was correct in law and that its judgment should be affirmed.

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SPECIAL APPENDIX.

Opinion of the United States Court of Appeals for the District of Columbia.

Before CLARK, WILBUR K. MILLER and PRETTYMAN, JJ.

CLARK, J.: This action originated with a complaint for an injunction filed by the appellant in the District Court of the United States for the District of Columbia on April 29, 1947. Appellee here was named defendant in the complaint in his capacity as War Assets Administrator and Surplus Property Administrator. A temporary restraining order was issued on that date and the cause came on for hearing May 6, 1947, defendant (appellee here) having filed a motion to dismiss. On May 9, 1947, the lower court decreed that the motion for preliminary injunction be denied and granted the motion to dismiss the complaint. This appeal followed.

The facts giving rise to the complaint, briefly stated, are as follows: Appellant had purchased surplus coal from the War Assets Administration during 1946, and early in March 1947 received from the War Assets Administration an invitation to bid on 10,000 tons of coal which stated, "This coal is offered F. O. B. cars, Camp Maxey, north of Paris, Texas." On March 13 appellant answered by telegram, offering to buy the coal as offered and requesting that "this tonnage be allocated to us on same terms and conditions and made a continuing part of our recent contract at same price." A letter from the War Assets Administration to appellant under date of March 19 expressed acceptance of the offer, stating in part, "Also, your terms of placing $17,500 with the First National Bank, Dallas, Texas, *for payment upon presentation of our invoices* to said bank are accepted." (Italics supplied.) This letter requested that enclosed standard War Assets Administration forms, one being an offer to purchase and the other being a sales memorandum; be executed and returned, which request was complied with by appellant on March 28. Appellant's letter of transmitted accompany-

ing the forms stated that $5,000 was being deposited at the Dallas bank that day and that the balance of the funds necessary to meet the invoices would be transferred to the Dallas bank when the shipment began.

War Assets Administration replied by telegram on April 1 informing appellant that the entire amount of $17,500 should be deposited in the Dallas bank prior to noon on April 4 or the sale would be cancelled. Although appellant arranged for an irrevocable letter of credit payable to War Assets Administration through the Dallas bank within the time specified, and so notified War Assets Administration, there was a further interchange of correspondence and on April 16 War Assets Administration informed appellant by telegram that the sale had been cancelled, holding appellant in default for failing to deposit immediately the full amount of $17,500 in the Dallas Bank.

Subsequently appellant learned that War Assets Administration had entered negotiations with another party for the sale of the coal involved here and filed the complaint, praying for an injunction against the sale of this coal to any person other than the plaintiff (appellant) and seeking a decree upon hearing of the cause that the sale to plaintiff is valid and in effect.

The court below was of the opinion that the complaint did not state a cause of action after expressing openly the view that the suit was, in effect, one for specific performance involving the United States as an indispensable party, and, therefore, that the court lacked jurisdiction.

We have recently had occasion to scrutinize the doctrine of sovereign immunity as a "jurisdictional" problem,[1] and in doing so we deemed it expedient to adopt the careful analysis which had been made previously by Justice Stephens of this Court in his opinion (dissenting in part, concurring in part) in *Franklin Tp. in Somerset County, N. J.* v. *Tugwell*, 66 App. D. C. 42, 85 F. 2d 208. For its obvious

[1] *Dollar* v. *Land*, 81 U. S. App. D. C. 28, 154 F. (2d) 307, *aff'd*, 330 U. S. 731.

value in this case we repeat his finding, stated (66 App. D. C. 63; 85 F. 2d 229) that:

> "Where a plaintiff asserts that an officer of the Government is acting without power and that therefore his acts are invalid, the court in determining the preliminary jurisdictional question whether the United States is a necessary party (whether necessary parties are before a court is, of course, jurisdictional), is confronted with a peculiar procedural problem or impasse, arising out of the fact that the determination of this question involves passing upon the very question involved in the merits. * * * Since a court must determine at the outset its jurisdiction to proceed, it is compelled to make a preliminary decision for jurisdictional purposes on the ultimate question in the suit, and this notwithstanding the fact that, when the merits are heard, it may be compelled to reach an opposite conclusion. The courts solve this problem by accepting at their face value, for jurisdictional purposes, the assertions of the complainant of want of power in the officers—unless such assertions are 'so unsubstantial and frivolous as to afford no basis for jurisdiction. . . .', (citing *Northern Pac. Ry. Co. v. North Dakota*, 250 U. S. 135, 39 S. Ct. 502, 63 L. Ed. 897) and by giving the assertions thus accepted their natural jurisdictional consequences in respect of who are necessary parties."

The words just quoted have real application here. In the complaint appellant asserted that the title to the coal had passed to it (appellant) and appellee, through his agents, was presently engaged in negotiations for disposition of the coal to a party other than the appellant. The complaint was met only by a motion to dismiss supported by affidavits. It was at this stage of the contest that the lower court dismissed the complaint on the ground of lack of jurisdiction. The allegation should have been treated as admitted and therefore the motion to dismiss could be properly granted only if it were clearly apparent to the court that the plaintiff (appellant here) would not be entitled to the relief sought under any state of facts which could be proved in support of the specific claim. *Tahir*

Erk v. *Glenn L. Martin Co.*, 116 F. (2d) 865. The summary nature of the hearing preceding dismissal precluded the careful consideration to which appellant was entitled.

All will concede at the outset that a court has no jurisdiction of a suit against the United States to which the United States has not consented. *United States* v. *Sherwood*, 312 U. S. 584, 587, 61 Sup. Ct. 767, 85 L. Ed. 1058. That is a ruling doctrine which has long been accepted, as the case cited demonstrates. However, since legal irresponsibility of the Federal Government is derived only by implication from the Constitution, the doctrine has received judicial delimitation which is well established. *United States* v. *Lee*, 106 U. S. 196, 1 Sup. Ct. 240, 27 L. Ed. 171. Therefore, although we may observe that the War Assets Administration functions only as an agency of the United States, it must also be noted that ". . . the government does not become the conduit of its immunity in suits against its agents or instrumentalities merely because they do its work." *Keifer and Keifer* v. *R. F. C.*, 306 U. S. 381, 388, 59 Sup. Ct. 516, 83 L. Ed. 784.

Appellant as complainant below in the suit for injunction, did not seek the court's aid to interfere in the use of official discretion by the appellee. Such discretion was exercised at the time the contract with appellant was entered into. If that contract served to vest title immediately in appellant then it follows that the ruling in *Philadelphia Company* v. *Stimson*, 223 U. S. 605, 32 Sup. Ct. 340, 56 L. Ed. 570, is controlling here. That ruling was based on a comprehensive review of the authorities, and we quote the language of Mr. Justice Hughes at pages 619 and 620 (omitting citations):

> "If the conduct of the defendant constitutes an unwarrantable interference with property of the complainant, its resort to equity for protection is not to be defeated upon the ground that the suit is one against the United States. The exemption of the United States from suit does not protect its officers from personal liability to persons whose rights of property they have

> wrongfully invaded. . . . And in case of an injury threatened by his illegal action, the officer cannot claim immunity from injunction process. The principle has been frequently applied with respect to state officers seeking to enforce unconstitutional enactments. . . . And it is equally applicable to a federal officer acting in excess of his authority or under an authority not validly conferred."

Clearly, then, it was incumbent upon the lower court in determining its jurisdictional capacity to decide the ultimate question of whether or not a contract of sale had been consummated between appellant and appellee. If so, the peculiar nature of the coal involved soundly bases appellant's resort to equity for relief. The use of the word "surplus" in the description of this coal is a word of art which has an important business connotation. Such coal is obtainable only from appellee and has unique value in that it may be exported under special license outside the limitations imposed by the Government under the export allocation system. Appellant had resold this coal, and the re-purchaser had contracted to export the coal to a foreign government. Newly mined coal obtainable in the open market would not suffice the purpose of the several contracts involving this surplus coal, since it could be exported only in accordance with the export allocation system.

It is our conclusion that the District Court erred in dismissing the complaint in the belief that it lacked jurisdiction. This cause is remanded to the District Court for further proceedings in accordance with this opinion.

Reversed and remanded.